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No. 07-A1016

IN THE

Supreme Court of the United States

PORT AUTHORITY POLICE
BENEVOLENT ASSOCIATION, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of New Jersey was required by the Compact Clause to apply federal law when reviewing the decision of an administrative agency created by the congressionally sanctioned Compact Agency.

2. Whether the Supreme Court of New Jersey improperly applied New Jersey law instead of federal law to review the decision of the administrative agency created by the Compact Agency.

3. Whether the decision of the Supreme Court of New Jersey is compatible with federal law.

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the Supreme Court of New Jersey:

Port Authority of New York and New Jersey

Port Authority Employment Relations Panel

Port Authority Police Benevolent Association, Inc.

CORPORATE DISCLOSURE

The Port Authority Police Benevolent Association, Inc., is a New York not-for-profit corporation with membership limited to sworn law enforcement personnel employed by the Port Authority of New York and New Jersey.

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PETITION FOR A WRIT OF CERTIORARI

The Port Authority Police Benevolent Association, Inc., petitions for a writ of certiorari to review the decision and judgment of the Supreme Court of New Jersey in *In the Matter of the Alleged Improper Practice under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction; IP 97-28, Final Decision and Order of the Port Authority Employment Relations Panel: Port Authority of New York and New Jersey, v. Port Authority Employment Relations Panel and Port Authority Police Benevolent Association, Inc.*, Docket No. A-6 September Term 2007.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 194 N.J. 314, 944 A.2d 611 and is attached as Appendix A, pp. 1a-39a. The opinion of the Port Authority Employment Relations Panel Hearing Officer is unreported and is attached as Appendix B, pp. 39a-80a. The opinion of the Port Authority Employment Relations Panel is not officially reported, but is commonly cited as 97 PAERP 28 (2001) and is attached as Appendix C, pp. 81a-101a. The Opinion of the Superior Court of New Jersey is unreported and is attached as Appendix D, pp. 102a-116a. The opinion of the Appellate Division is unreported and is attached as Appendix E, pp. 117a-119a.

JURISDICTION

The opinion of the Supreme Court of New Jersey was entered on April 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The Court granted an extension for filing this Petition until September 6, 2008.

RELEVANT STATUTORY PROVISIONS

Pertinent provisions of the Constitution of the United States and the laws of New Jersey and New York are provided in Appendix F, pp. 120a-122a.

STATEMENT OF THE CASE

In establishing a federal Constitution, the Founders included a mechanism to enable states to address regional concerns extending beyond a particular state's boundaries without requiring a federal resolution. This mechanism is the Compact Clause (Art. I, §10, cl. 3), which, while permitting states to

join together to advance regional interests, is predicated on the requirement of congressional consent. The Compact Clause has been utilized with Congress's consent to great effect by states to address regional issues of enormous importance – including interstate transportation, waste disposal, and allocation of natural resources – as well as to spur economic development. This ingenious feature of our federal system has been so effective that this Court has observed that the interstate "compact is more than a supple device for dealing with interests confined within a region," "it is also a means of safeguarding the national interest." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Like many states, New York and New Jersey are separated by a common boundary, the Hudson River and New York Bay. To administer the common harbor interests of New York and New Jersey, the states formed the Port Authority of New York and New Jersey ("Port Authority"). That Compact – embodied in virtually identical legislation passed by each state[1] – established the Port Authority as "a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other, or by Act or Acts of Congress, ..." 42 Stat. 174, 176 (1921). Among the powers granted the Port Authority was the ability to hire employees.[2]

In 1947, the Port Authority entered into an agreement with the City of New York providing that the

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[1] N.J.S.A. Title 32; McKinney's Unconsolidated Laws, §6401 *et seq.*

[2] N.J.S.A. 32:1-15; McKinney's Unconsolidated Laws §6415.

Port Authority would lease and operate the municipal airports then owned by the City, including what later became known as JFK. Section 11(c) of the agreement stipulates that "[t]he Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises [and that t]he City will have no responsibility for maintaining . . . police personnel in the demised premises." The contract also permitted the Port Authority to enter into subcontracts and subleases "provided that all such things shall be done by the Port Authority in its own name . . . ." [A. 6a]. Pursuant to its contract with the City, the Port Authority Police Department began to patrol JFK.

In 1976 the Port Authority adopted the Port Authority Labor Relations Instruction ("Instruction") governing labor relations with its employees. The Instruction provides that it would be an improper practice for the Authority to refuse to negotiate "salaries, wages, hours, and other terms and conditions of employment in good faith . . . ." Instruction, §XI(A)(d). The Instruction also provides that "organization, staffing, planning, operating and financial policies shall not be subjects of negotiations . . . ." Instruction, §III(D). [A. 5a]. The Instruction created the Port Authority Employment Relations Panel ("Panel") to resolve disputes between the Port Authority and its employee organizations. [A 5a].

The Compact was amended to approve the Panel's creation and to provide for judicial review of its decisions.[3] The Compact does not specify what law a court or agency must apply when construing its provisions.

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[3] N.J.S.A. 32:1-175; McKinney's Unconsolidated Laws §7141.

The Port Authority Police Benevolent Association, Inc. ("PBA"), became the exclusive bargaining agent for the Authority's Police Officers. [A. 6a]. In July 1991, the Port Authority entered into a Memorandum of Agreement with the PBA ("Memorandum"). In Section XXXI(1) of the Memorandum, the Port Authority agreed that there would be

> no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other unit work currently and heretofore performed by Police Officers shall be maintained.
>
> . . . .
>
> All existing Police Officer positions and/or assignments shall be maintained during the term of this Memorandum of Agreement in accordance with the Police Position and/or Assignment List agreed upon between the parties so long as the work being performed continues to be performed by or *on behalf of* the Port Authority.

[A. 7a (emphasis supplied)].

In 1997, however, the Port Authority accepted a proposal from JFK International Air Terminal LLC ("JFKIAT") that provided for the reconstruction of the international terminal at an overall cost of $1.2 billion. The Port Authority and JFKIAT entered into an exhaustive lease that outlined each party's obligations with regard to the international terminal. The lease agreement provided that JFKIAT "shall furnish adequate security and guard service or such comparable means *as approved by the Port Authority.*" [A. 31a (emphasis supplied)]. The Port Authority re-

mained obligated to provide federally required security. [A. 9a-10a].[4]

On May 13, 1997, JFKIAT assumed responsibility for all security operations at the international terminal and for frontage management of pedestrians and vehicles. JFKIAT hired unarmed civilian guards to perform work previously done by police officers represented by the PBA. [A. 10a].

The PBA filed an unfair labor practice charge against the Port Authority alleging that the Port Authority had unilaterally subcontracted bargaining unit airport police work to JFKIAT without bargaining. After the Port Authority denied the charge, the Panel assigned the matter to a hearing officer. [A. 11a].

In its post-hearing brief, the PBA cited extensively to decisions of the Panel, of the National Labor Relations Board ("NLRB"), and to *Fibreboard Paper Prods. Corp. v. NLRB.*, 379 U.S. 203 (1964).[5] In its post-hearing brief, the Port Authority relied upon Panel decisions and upon *Fibreboard*, without referring to any New Jersey authority.[6]

Relying exclusively on Panel and National Labor Relations Act precedent, the Hearing Officer found that work previously performed by bargaining unit police officers had been transferred to civilian guards, but that the Port Authority did not transfer the

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[4] At the time, Federal Aviation Administration regulations applied. 14 C.F.R. Part 107 (1997). The current regulation of the Department of Homeland Security is 49 C.F.R. Part 1542 (2006).

[5] PBA Brief at 24-31, 33-43.

[6] Port Authority Brief at 8-9, 12, 24-25, 27-30.

disputed work and no longer had "the requisite authority to dictate" which employees would perform the disputed work. [B. 73a]. Ostensibly applying Panel precedent, he found that (1) the Port Authority had altered its basic operation by "remov(ing) itself from the business of managing and operating the [International Arrivals Building] IAB"; (2) the Port Authority had "not only ceded operational management and day-to-day traffic control to [JFKIAT] but the decision to privatize also included a $1.2 billion lease agreement with JFKIAT to rebuild and operate the IAB . . ."; (3) the PBA had failed to show that the decision was based on factors amenable to collective bargaining; and (4) the police officers suffered an adverse impact, both qualitatively and quantitatively, from the decision, because they had lost overtime opportunity. [B. 73a-79a]. He recommended dismissing the charge.

The PBA filed Exceptions and a supporting brief, again citing Panel and NLRB authority and *Fibreboard*.[7] Given the opportunity to comment on the Panel's tentative decision, the Port Authority did not rely on New Jersey authority. Instead, the Port Authority relied on Panel decisions, upon NLRB decisions, and upon *Fibreboard*.[8]

Although it accepted the Hearing Officer's factual findings, the Panel concluded that the Port Authority had violated the Instruction and the Memorandum by transferring unit work without bargaining. The Panel found that

(1) the PBA was attempting to preserve the disputed work for its police officers;

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[7] PBA Exceptions at 24-26, 28-30, 32-43.

[8] Port Authority Comments at 7-9, 13, 16-27, 29-32.

(2) the Port Authority did not, and could not without violating its agreement with New York City, go out of the business of providing security at JFK;

(3) the Port Authority did not alter its basic operation because it continues to provide law enforcement functions at the IAB;

(4) the Port Authority "made no capital investment with respect to how security functions are performed within the IAB or in the frontage areas";

(5) the "financing arrangements which the Port Authority utilized to construct a new IAB are irrelevant to the unit work issues in dispute."

(6) the impact of competing wage rates for different classifications of employees was "peculiarly suitable" for collective bargaining; and

(7) the transfer of work had a substantial impact on wages, hours, and working conditions because positions were eliminated and employees lost overtime opportunity.

[C. 88a-99a]. The Panel concluded that "The Port Authority clearly and definitively required in the JFKIAT lease that the work of patrolling, guarding and traffic control be performed, . . . and we find that it continues to be performed on the Port Authority's behalf." [C. 93a].

The Panel therefore ordered the Port Authority to restore the disputed work and to negotiate before unilaterally changing terms and conditions of employment. [C.100a]. In reaching this conclusion, the

Panel relied exclusively upon its own precedent, including its "*Fibreboard* plus" test.

Given the choice of seeking review of the Panel decision in the Superior Court of New Jersey or the New York Supreme Court,[9] the Port Authority filed in New Jersey.

At this point, the Port Authority changed its focus. Although it expressly conceded that neither New Jersey nor New York law is applicable to the Port Authority, in its brief to the Superior Court the Port Authority relied exclusively on New Jersey authority and on the New Jersey Supreme Court's application of *Fibreboard* to New Jersey state employees. The Port Authority did not mention Panel or NLRB decisions.[10]

As the nominal Respondent, the Panel reminded the Superior Court that neither New Jersey nor New York statutes or decisions controlled the interpretation of the Instruction and review of Panel decisions. The Panel argued that its decision was entitled to deference and correctly applied the Instruction and Panel authority to the facts of the case. The Panel cited the conflict between decisions of New Jersey and New York public employee relations boards on the negotiability of subcontracting to explain why it had taken an independent approach:

> Contrast Local 195, IFPTE v. State, 88 N.J. 393 (1982) (subcontracting is not mandatorily negotiable in the New Jersey public sector) with city [*sic*] of Poughkeepsie v. Newman, 95 A.D.2d 101, 466 N.Y.S.2d 752 (1983), leave to appeal denied,

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[9] N.J.S.A. 32:1-175; McKinney's Unconsolidated Laws §7141.

[10] Port Authority Brief at 13-21

> 62 N.Y.2d 608, 467 N.Y.S.2d 1026 (1984) (subcontracting is mandatorily negotiable in the New York public sector).

The Panel asserted that it had considered, and reasonably rejected, the Port Authority's position.[11]

As Intervenor, the PBA's brief cited *Fibreboard*, New Jersey and New York authority. The PBA argued that

> neither creator state may unilaterally impose its legislative will on the bi-state entity. . . . It is inappropriate for either compacting state to seek to impose its legislative policy on any issue, including issues of public labor law, without joint legislative action by the compacting states. [citation omitted].

The PBA expressly argued that "the law that must be applied is the . . . Instruction, not New Jersey's Title 34." Furthermore, the PBA argued that New York courts "would assuredly endorse the findings of the Panel under these facts." The PBA argued that Panel decisions and *Fibreboard* required affirmance of the Panel decision.[12]

Applying the New Jersey standard of review, the Superior Court found that the Panel's findings of fact were supported by substantial evidence, that the Panel's decision was neither arbitrary, capricious, or unreasonable, and deferred to the Panel's expertise. "It is an uncontested fact that when the operation of the IAB was turned over to [JFKIAT] in May 1997, the PAPBA officers who had been previously stationed outside for the management of pedestrians

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[11] Panel Brief at 2-5, 7-14, 16-17.

[12] PBA Brief at 13-16, 19-26.

and vehicles were removed, assigned elsewhere, and replaced by non-unit civilian security personnel" in violation of the Memorandum. Applying Panel precedent, the Superior Court found that the Port Authority had subcontracted the disputed work without the negotiation required by the Panel's "*Fibreboard* Plus Substantial Impact" test. [D. 110a-115a].

In its brief to the Appellate Division, the Port Authority again acknowledged that neither New Jersey nor New York law was controlling in Port Authority cases. Nevertheless, the Port Authority relied extensively upon New Jersey and New York authority to support its position. The Port Authority did not cite a single Panel decision in its opening brief and only one in its reply brief. It relied on New Jersey law.[13]

The Panel argued that its decision was consistent with the Instruction and its prior decisions. It argued that labor law decisions of New Jersey were not controilling because such cases "may involve different standards that may lead to different results." It reiterated the contrast between New Jersey's *Local 195* decision and New York authority on the duty to negotiate over subcontracting.[14] It repeated its conclusion that police work at the IAB was performed "on behalf of" the Port Authority.[15]

The PBA opposed the Port Authority's "attempts to directly apply the legislative policy of New Jersey applicable to public employers . . . ." The PBA

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[13] Port Authority Brief at 15-27; Reply Brief at 2-3, 10-11, 16, 18.

[14] Panel Brief at 10-16.

[15] Panel Brief at 19.

reiterated that the Instruction provided that New Jersey and New York authority did not bind the Panel or reviewing courts. The PBA argued, therefore, that the Port Authority's reliance on New Jersey cases "misses the point because the law that must be applied in this matter is the Port Authority Labor Relations Instruction, not New Jersey's Title 34." The PBA argued that the Panel had properly applied the Instruction and its precedent to the facts.[16]

The Appellate Division applied New Jersey's standard of review and the Panel's "*Fibreboard* plus" analysis. The Appellate Division found that "the decision of the Panel, their findings of facts, and conclusions of law are well supported in the record and reflect the opinion of this Court." [E. 118a-119a].

In its Petition for a Writ of Certiorari to the Supreme Court of New Jersey, the Port Authority relied on New Jersey and National Labor Relations Act authority concerning the scope of judicial review. The Port Authority argued that in *City of Jersey City v. Jersey City Police Officers Benevolent Association*, 713 A.2d 472 (N.J. 1998), the court had rejected an order of the New Jersey Public Employment Relations Commission in a factually analogous situation.[17]

The PBA and the Panel opposed the Petition. The PBA again argued that because neither New Jersey nor New York law controlled, the Port Authority's reliance on *Jersey City* was improper. The Appellate Division, wrote the PBA, "gave deference to the Panel decision, which . . . was appropriately based upon Panel precedent and not unilateral laws of either

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[16] PBA Brief at 16, 19-36.

[17] Petition at 3-5.

New Jersey and/or New York."[18] The Panel argued for a limited standard of review and rejected the Port Authority's reliance on *City of Jersey City*.[19]

The Supreme Court of New Jersey granted the Writ. Relying on the briefs submitted to the Appellate Division, the court applied the New Jersey Administrative Procedure Act and New Jersey case law to establish the standard of review of Panel decisions. [A. 18a-21a]. The court then concluded that *Jersey City*, a decision interpreting New Jersey law, had "refined" this Court's analysis in *NLRB v. Borg-Warner*, 356 U.S. 342 (1958), and *Fibreboard*. [A. 24a]. Applying that "refined analysis," the majority rejected the Panel's conclusions. [A. 24a-28a]. Having determined that the law of New Jersey governed the matter, the New Jersey Supreme Court failed to consider whether other law might govern the matter.

Also applying a New Jersey standard of review [A. 33a], the dissent concluded that the Panel decision was not "arbitrary, capricious, or unreasonable" under New Jersey or NLRB authority. [A. 36a-38a]. Like the majority, the dissent did not mention the PBA's argument that the court could not apply New Jersey law.

REASONS FOR GRANTING THE PETITION

As a congressionally sanctioned interstate compact, the Port Authority Compact is a federal law subject to federal construction. *See, e.g., New York v. Hill*, 528 U.S. 110, 111 (2000); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *Petty v. Tennessee-Missouri Bridge*

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[18] PBA Brief at 10-13.

[19] Panel Brief at 6-9.

Commission, 359 U.S. 275, 278-279 (1959) ("we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises.").[20] While the Court shows "deference to state law in construing a compact, state law as pronounced in prior applications and rulings is not binding." *Petty*, 359 U.S. at 278, n. 4. Furthermore, such deference cannot be transformed into "submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it . . . ." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Because the Compact establishing the Port Authority of New York and New Jersey[21] is but one of at least 195 interstate compacts[22] authorized by Congress under the Compact Clause of the Constitution, the impact of this case extends well beyond the subcontracting dispute between the Port Authority and its Police Officers.

This Petition asks the Court to determine whether the Instruction adopted by the Port Authority is also a federal law subject to review under federal law and,

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[20] The Port Authority has conceded that amendments to the Compact authorized by the legislatures of both states are properly viewed as federal law. *Brooklyn Bridge Park Coalition v. Port Authority of New York and New Jersey*, 951 F.Supp. 383, 390 n. 5 (E.D. N.Y. 1997). Both states have approved the adoption of the Instruction and the creation of the Panel. [A. 3a n.1].

[21] 42 Stat. 174 (1921). See also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 35-36 (1994); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 301 (1990).

[22] http://ssl.csg.org/compactlaws/comlistlinks.html

if so, whether the Supreme Court of New Jersey erred by applying New Jersey authority instead of federal law when reviewing the Panel decision.

The questions presented are not abstract, for throughout the New Jersey proceedings the PBA consistently argued that a New York court would affirm the Panel decision. If the Panel rules against the PBA in another subcontracting case, the PBA could, indeed, should and would, seek review in the New York courts. The conflict between the courts of the two states on the interpretation of the Compact (and of the Instruction) is not hypothetical; the conflict exists today and will continue to surface in future cases unless resolved.

But the choice of forum should not control either the choice of law or the result of judicial review of a Compact Agency's actions. Avoiding strategic forum shopping is one reason interstate Compacts must be governed by a uniform federal law, subject to review by this Court.[23] As this Court has already held in a case involving the Port Authority, "bistate entities created by compact . . . are not subject to the unilateral control of any one of the States that compose the federal system." *Hess v. Port Authority Trans-Hudson Corp*, 513 U.S. at 42. Yet that is precisely what the New Jersey Supreme Court did here.

Despite the PBA's repeated assertions that neither New York nor New Jersey law controlled, and despite the Port Authority's implicit agreement or failure to

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[23] Even where, as here, the Compact permits litigation in state courts, federal law applies. This Court has jurisdiction to review state court decisions misapplying federal law. *Vaca v. Sipes*, 386 U.S. 171, 174 (1967); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 30.

dispute that point, and despite the PBA's claim that New York law would require affirmance of the Panel decision, the Supreme Court of New Jersey applied only New Jersey precedent concerning both the scope of appellate review and the substantive claim by the Port Authority.

Contrary to its own precedent, the New Jersey Supreme Court made no pretense of considering either New York or federal authority.[24] In *Lieberman v. Port Authority of New York and New Jersey*, 622 A.2d 1295, 1299 (N.J. 1993), the court explained that "although we are not bound by New York law, we deem it to be an influential precedent because of the bi-state nature of the Port Authority." In other cases, the court had held that the interpretation of bi-state compacts is a matter of federal law and that neither of the signatory states may impose its law on the entity without permission in the compact itself. *Bunk v. Port Authority of New York and New Jersey*, 676 A.2d 118, 122 (N.J. 1996); *Eastern Paralyzed Veterans Assoc., Inc. v. City of Camden*, 545 A.2d 127, 131, 136 (N.J. 1988). *Bunk* and *Camden* applied the doctrine of "complementary or parallel state legislation," thereby requiring consideration of New York law.

Although this case presents the question in the context of labor relations, federal courts have considered the law governing compacts in a number of

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[24] Although the PBA did not label its argument below as a contention that federal law applied, it did argue that the New Jersey courts must consider New York as well as New Jersey authority. The amalgam of these state authorities, combined with the Panel's authority and its *Fibreboard* plus standard, constitutes a federal common law and is a model applicable in litigation involving all compacts.

substantive areas. The Eighth Circuit has held that a compact agency was enforcing a federal right created by the compact when it sued Nebraska for refusing to permit the construction of a nuclear waste facility. *Energy Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000). The Eighth Circuit later held that in the absence of federal common law on the meaning of compact language, the district court properly sought guidance from the Restatement of Contracts, not state law. *Energy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 547 (8th Cir.), *cert. dismissed*, 542 U.S. 960 (2004). The District of Columbia Circuit has similarly applied the "federal common law standard" to determine whether employees of a compact enjoy immunity in tort actions even where the compact provides that state law applies to the tort itself. *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1289 (D.C. Cir. 1997).

A. Federal Law Governs the Scope of Judicial Review

Although the Compact provides a choice of forum for seeking review of a Panel decision,[25] the New Jersey courts violated the well-established principle that the construction of an interstate compact approved by Congress presents a federal question. Unlike the compact provisions discussed in *Beebe*, which expressly specify that the law of the forum state will apply to certain claims against the bi-state compact, the pertinent New Jersey and New York statutes that form the Compact do not provide that the law of the forum controls. Where the compact does not provide that state law controls, "federal law governs

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[25] N.J.S.A §32:1-175; McKinney's Unconsolidated Laws §7141.

. . . ." *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d at 1288

The Supreme Court of New Jersey's decision to apply its State Administrative Procedure Act standard of review conflicts with *Kiska Construction Corporation-U.S.A. v. Washington Metropolitan Area Transit Authority*, 167 F.3d 608, 611-612 (D.C. Cir. 1999), which held that WMAA, as a compact, was not an "agency" within the meaning of the District of Columbia Administrative Procedure Act.

The New Jersey Supreme Court applied the State's Administrative Procedure Act, N.J.S.A. 52:14B-1 to -25. [A. 18a-20a]. Citing *Hunterdon County Bd. of Chosen Freeholders and Communications Workers*, 561 A.2d 597, 600 (1989), the court concluded "Therefore, it is *only* 'in situations where agency expertise is essential towards understanding the proper context of a dispute [that] a deferential standard of review is appropriate.'" [emphasis supplied] [A. 21a]. In this case, however, the court was less deferential than in *Hunterdon*, where it had stated that it would defer "particularly" in such situations. *Id.*

Interestingly, *Hunterdon* involved review of a decision of the New Jersey Public Employee Relations Committee ("PERC"). For no rational reason, the Supreme Court of New Jersey now accords less deference to Panel decisions than to PERC decisions.

At the same time, the New Jersey court conceded that New York courts would apply a more deferential standard:

> In its reported case law, New York has applied a deferential standard of review to Panel decisions. *See Pagano v. Port Authority*, 270 A.D.2d 206, 705 N.Y.S.2d 230 (N.Y. App. Div. 2000) (applying

> standard that Panel determination "may not be disturbed since substantial evidence supports [it]"); *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833, 839 (N.Y. 1974) (explaining that administrative tribunal's factual determinations are sustained if supported by substantial evidence, and exercise of discretion by administrative tribunal will be sustained "unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'").

[A. 18a n. 10]. The court did not explain why this "influential precedent" could be ignored or distinguished. *Lieberman*, 622 A.2d at 1299.

Although Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e), mandates the "substantial evidence" standard for judicial review of the NLRB's findings of fact, the degree of deference accorded to NLRB statutory interpretations has been developed by the Court. In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-501 (1978), the Court stressed that such judicial review must be "limited," for it "is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. . . . The function of striking [the balance between competing interests] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." More recently, the Court said that it would uphold the NLRB's construction of the Act when it is "rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board." *Curtin-Matheson Scientific v. NLRB*, 494 U.S. 775, 787 (1990).

This Court's standard is compatible with the New York standard rejected by the New Jersey Supreme Court. It is not compatible with the New Jersey standard applied in this case. This conflict makes this issue appropriate for review by the Court.

Both the New Jersey Superior Court and the Appellate Division deferred to the Panel's interpretation of the Instruction. The New Jersey Supreme Court did not. It concluded that the Panel decision

> is not entitled to any special deference and should be rejected. This is because the Panel neither followed the law nor relied on any particularized expertise in reaching its conclusion. [A. 22a].

To the contrary, the Panel clearly explained its adherence to the Instruction, to the Memorandum of Agreement,[26] and to Panel Precedent.

The less deferential standard of review erroneously chosen by the Supreme Court of New Jersey mandated its wrongful rejection of the Panel's decision. For example, the Hearing Officer and the Panel accepted the admission of the Port Authority Police Chief that subcontracting reduced police officer overtime. [B. 78a-79a; C. 84a]. The Supreme Court rejected the Police Chief's "unsubstantiated opinion." [A. 28a]. Neither *Beth Israel* nor *Curtin-Matheson* permit such cavalier rejection of uncontradicted testimony.

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[26] After the Panel adopted the "*Fibreboard* plus substantial impact test," the Port Authority and PBA agreed that the Panel would have exclusive jurisdiction for unit work disputes. Prior to this explicit contractual agreement [C. 86a,88a-89a and n. 2], unit work disputes were brought before the Panel and also arbitrated as contractual violations.

B. As the Creation of the Compact, the Instruction Must Be Interpreted According to Federal Law

The Supreme Court of New Jersey's decision conflicts with *Kansas v. Colorado*, 514 U.S. 673 (1995), in which the Court held that a violation of the Trinidad River Operating Principles promulgated by the Arkansas River Compact would constitute a violation of the compact. See also *Washington-Dulles Transportation, Ltd., v. Metropolitan Washington Airports Authority*, 263 F.3d 371 (4th Cir. 2001) (federal court has jurisdiction to require adherence to compact's published competitive bidding procedure). The Port Authority's Instruction became part of the Compact upon its approval by both State legislatures[27] and must be treated as a federal law in the same way as the Arkansas River Compact's Operating Principles in *Kansas* and the published bidding procedures in *Washington-Dulles Transportation*.

The Supreme Court of New Jersey's decision also conflicts with *Operating Engineers Local 542 v. Delaware River Joint Toll Bridge Commission*, 311 F.3d 273, 274, 276 (3rd Cir. 2002), in which the Third Circuit held that neither the New Jersey nor the Pennsylvania collective bargaining laws applied to an interstate compact because neither state legislature had expressed a "clear intent to impose their labor laws upon the Commission."[28]

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[27] N.J.S.A. §32.1-175; McKinney's Unconsolidated Laws §7141.

[28] But see *Delaware River Port Authority v. Fraternal Order of Police, Penn-Jersey Lodge 30*, 290 F.3d 567 (3rd Cir. 2002), where the Third Circuit reluctantly followed *Delaware River and Bay Authority v. Operating Engineers Local 68*, 688 A.2d 569 (N.J. 1996), *cert. denied*, 522 U.S. 861 (1997), which applied New

Indeed, when it suited its purpose, the Port Authority has successfully argued that courts could not impose aspects of either state's labor laws. *Dezaio v. Port Authority of New York and New Jersey*, 205 F.3d 62, 65 (2nd Cir.), *cert. denied*, 531 U.S. 818 (2000) (New York anti-discrimination laws); *Agesen v. Catherwood*, 260 N.E.2d 525 (N.Y. 1970) (New York minimum wage law); *Baron v. Port Authority of New York and New Jersey*, 968 F.Supp. 924 (S.D.N.Y. 1997) (New York or New Jersey human rights laws); *Port Authority Police Sergeants Benevolent Association v. Port Authority of New York and New Jersey*, C.A. No. 97-1651 (WHW) (D.N.J. 1997) (unreported decision attached at G. 123a) (New York or New Jersey interest arbitration laws).

In concluding that the Port Authority had no obligation to bargain, the Supreme Court of New Jersey relied upon two of its earlier decisions, *In re Local 195, IFPTE*, 443 A.2d 187 (1982), and *City of Jersey City v. Jersey City Police Officers Benevolent Ass'n*, 713 A.2d 472 (1998), both of which reviewed PERC decisions interpreting New Jersey law. In *Local 195*, the court stated that *Fibreboard* "is not persuasive authority" in the public sector. 443 A.2d at 191 n. 8. Instead, the court formulated its own three-part test for scope of negotiability decisions. 443 A.2d at 191-192. In *Jersey City*, the court applied its own *Local 195* test.

Although the New Jersey court might be correct in refusing to apply *Fibreboard* in New Jersey public

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Jersey law to impose bargaining obligations on a compact agency. The two *Delaware River Port Authority* cases demonstrate that this is a recurring issue meriting review by this Court.

sector cases, the New Jersey Supreme Court was not considering a New Jersey public sector appeal. Nor was the court acting in a vacuum when it considered the Panel decision. It was reviewing a Panel decision applying the "*Fibreboard* plus" standard which the Panel had developed in 1978 [A. 25a n. 12], two years after its creation, and had applied consistently thereafter. The New Jersey Supreme Court applied New Jersey precedent contrary to the express directive in the Instruction:

> In all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation, Panel members and other persons appointed by the Panel shall be guided but not bound by administrative and judicial interpretations of the public sector labor law of the states of New York and New Jersey.

Instruction, Section III, Paragraph D.

Relying upon *Niagara Frontier Transportation Authority*, 18 PERB 3083 (1985), and New York's highly deferential standard of review, the PBA argued that the New York courts would have affirmed the Panel decision. Yet the New Jersey Supreme Court did not consider the views of New York State when it rejected the Panel decision.

Because it found *Fibreboard* was "not persuasive," the New Jersey court ignored the requirement in the Instruction that State law *not* apply "[i]n all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation . . . ." Indeed, pursuant to this directive, the Panel in 1978 had expressly applied *Fibreboard*, not the laws of either State, as the "framework for

determining whether a decision made by management is a mandatory or non-mandatory subject of negotiation." The Panel then created the "*Fibreboard* plus substantial impact" test. Citing *Auto Workers v. NLRB (General Motors)*, 381 F.2d 265 (D.C. Cir.), *cert. denied*, 389 U.S. 857 (1967), and New Jersey and New York authority, the Panel noted that "even in the absence of layoffs, a reduction in the size of the bargaining unit as a result of a decision to subcontract has been held to be a mandatory subject of bargaining in the private sector . . . and . . . in the public sector." *The Lieutenant's Case*, 77 PAERP 6 (1978) (sl. op. 31, 34-38). The New Jersey Court's rejection of *Fibreboard* colored its rejection of the Panel's decision in this case.

Because it found *Fibreboard* was "not persuasive," the New Jersey court did not consider this Court's clear distinction between going out of business and subcontracting an operation. In *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Court held that an employer had an absolute right to terminate its entire business for any reason, but distinguished a complete closing from a partial closing. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Court found no obligation to bargain over an economically motivated decision to shut down part of a business. These decisions left unaltered *Fibreboard's* principle that the decision to subcontract is a mandatory subject of bargaining if bargaining unit employees are replaced with those of an independent contractor to do the same work under similar conditions of employment. *Fibreboard Paper Prods. Corp. v. NLRB.*, 379 U.S. at 215.

A major distinction between going out of business and subcontracting that business is that under gen-

erally accepted law the prime contractor remains responsible for the work performed by the subcontractor. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 498 (4th Cir. 1998); *Blanchette v. Cataldo*, 734 F.2d 869, 875 (1st Cir. 1984); RESTATEMENT (SECOND) OF AGENCY §5(1) (1958).[29] Thus, if the Port Authority subcontracted IAB security work to JFKIAT, as the Panel concluded, the Port Authority remained responsible to New York City for JFKIAT's work. However, if the Port Authority terminated its security business at IAB, New York City has no claim against the Port Authority for nonfeasance or malfeasance by JFKIAT and/or its subcontractors.

After 9/11, indeed, after the first attack on the World Trade Center in 1993, is the federal government prepared to say, as the New Jersey Supreme Court did, that a port authority can terminate its contractually required responsibility for port or airport security?[30] The Port Authority's lease to JFKIAT expressly provided that the Port Authority had to review and approve JFKIAT's security and guard service. [A. 31a]. Because the Port Authority's agreement with New York City provided that "[t]he Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises," the Panel [C. 88a-89a, 93a-95a] and the

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[29] Courts rely upon the Restatements to develop federal common law in Compact Clause litigation. *See, e.g., New York v. O'Neill*, 359 U.S. 1, 9 (1959); *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 96, 106 (3rd Cir. 2008); *Energy Arkansas*, 358 F.3d at 546.

[30] With its contract with JFKIAT, the Port Authority subcontracted (or terminated) its responsibility for all airport security except that required by Federal Aviation Administration regulations. 14 C.F.R. Part 107 (1997).

Superior Court [D. 105a-106a and n. 1, 111-112] expressly concluded that JFKIAT was acting "on behalf of" the Port Authority, which remained ultimately responsible for providing police for airport security.

Thus the Panel, the Superior Court, and the Appellate Division decisions are consistent with federal principles distinguishing between subcontracting and "going out of business." The New Jersey Supreme Court's decision is not.

CONCLUSION

The petition for the writ of certiorari should be granted and the decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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August 28, 2008

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY

A-6 September Term 2007

IN THE MATTER OF THE ALLEGED IMPROPER PRACTICE UNDER SECTION XI, PARAGRAPH A(d) OF THE PORT AUTHORITY LABOR RELATIONS INSTRUCTION; IP 97-28, FINAL DECISION AND ORDER OF THE PORT AUTHORITY EMPLOYMENT RELATIONS PANEL: PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Petitioner-Appellant,

v.

PORT AUTHORITY EMPLOYMENT RELATIONS PANEL,
Respondent-Respondent,

and

PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.,
Intervenor-Respondent.

February 4, 2008, Argued
April 9, 2008, Decided

On certification to the Superior Court, Appellate Division.

COUNSEL: *Donald F. Burke* argued the cause for appellant.

Christine Carey Lilore argued the cause for respondent Port Authority Police Benevolent Association.

Robert E. Anderson argued the cause for respondent Port Authority Employment Relations Panel

(*Mr. Anderson*, General Counsel, New Jersey Public Employment Relations Commission, attorney).

JUDGES: JUSTICE RIVERA-SOTO delivered the opinion of the Court. CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA and HOENS join in JUSTICE RIVERA-SOTO's opinion. JUSTICE ALBIN has filed a dissenting opinion, in which JUSTICE WALLACE joins. JUSTICE LONG did not participate.

JUSTICE RIVERA-SOTO delivered the opinion of the Court.

For over a decade, the Port Authority of New York and New Jersey (Port Authority) and the union representing its police officers, the Port Authority Police Benevolent Association, Inc. 'PBA), have litigated a discrete issue: whether the May 1997 lease of the international terminal at John F. Kennedy International Airport (JFK Airport)—and the resulting redeployment, without any job losses or terminations, of Port Authority police officers to other portions of the JFK Airport—gave rise to an obligation on the part of the Port Authority to collectively bargain that redeployment with the PBA.

Based on an improper practice charge filed by the PBA, a hearing officer assigned by the Port Authority Employment Relations Panel (Panel) concluded that "the Port Authority's unilateral decision to sublease operational control and management of the [international terminal] to [a private entity] was not a mandatory subject of negotiations." The hearing officer further concluded that, even if redeployment of the PBA-represented police officers constituted a transfer of work covered by the collective bargaining agreement, the PBA nevertheless had failed to satisfy

the legal requirements necessary to find that such redeployment was a mandatory subject of negotiations. As a result, the hearing officer recommended that the PBA's improper practice charge be "dismissed in its entirety." The Panel rejected the hearing officer's recommendations, and concluded instead that "the Port Authority violated the [Port Authority of New York and New Jersey Labor Relations] Instruction [that provided for collective bargaining rights to employees of the Port Authority and created the Panel] when it transferred PBA unit work to non-unit employees without negotiating with the PBA." Citing to the deference owed to administrative agencies, both the Law Division and the Appellate Division sustained the Panel's determination.

We conclude that, pursuant to the Instruction governing labor relations at the Port Authority, the redeployment of Port Authority police officers occasioned by the 1997 lease of the international terminal at JFK Airport was exempt from any collective bargaining requirement. We further conclude that, even if the Port Authority was required to collectively bargain the effects of the 1997 lease of the international terminal at JFK Airport, and even if the work on the leased premises may well have constituted "unit work," the Port Authority was not obligated to collectively bargain its transfer in any event.

I.

A.

Recognizing the special legal status of the Port Authority, we start with an overview of the parties and their interlocking relationships:

> On April 30, 1921, The Port of New York Authority was established to administer the

common harbor interests of New York and New Jersey. The first of its kind in the Western Hemisphere, the organization was created under a clause of the [United States] Constitution permitting Compacts between states, with Congressional consent. An area of jurisdiction called the "Port District," a bistate region of about 1,500 square miles centered on the Statue of Liberty, was established. In 1972, the organization's name was changed to The Port Authority of New York and New Jersey to more accurately identify [its] role as a bistate agency. [http://www.panynj.gov/AbouttthePortAuthority/HistoryofthePortAuthority/.]

. . . .

The Port Authority is a financially self-supporting public agency that receives no tax revenues from any state or local jurisdiction and has no power to tax. It relies almost entirely on revenues generated by facility users, tolls, fees, and rents. The Governor of each state appoints six members to the Board of Commissioners, subject to state senate approval. Board Members serve as public officials without pay for overlapping six-year terms. The Governors retain the right to veto the actions of Commissioners from his or her own state. Board meetings are public.

The Board of Commissioners appoints an Executive Director to carry out the agency's policies and manage the day-to-day operations. [http://www.panynj.gov/AbouttthePortAuthority/Governance/.]

See generally, N.J.S.A. 32:1-1 to 2-37; *N.Y. Unconsol. Laws* Ch. 151 § 1 (2007).

In 1976, the Port Authority adopted its Labor Relations Instruction. Among other things, the Instruction (1) safeguarded the right to collectively bargain via employee organizations for Port Authority non-managerial employees; (2) created the Panel to administer disputes between the Port Authority and its employee organizations; (3) established procedures for the processing of those disputes; and (4) provided for judicial review of any decisions of the Panel. The grant of authority to the Panel was subject to a significant exemption: Section III(D) of the Instruction specifically provides that "[n]otwithstanding the foregoing, the mission and management responsibilities of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall *not* be subjects of negotiation with employee organizations." (Emphasis supplied.)[1]

Finally, as provided in its collective bargaining agreement with the Port Authority, the PBA is "the sole and exclusive representative of [Port Authority] Police Officers for the purpose of collective negotiations with respect to rates of pay, hours of work and other terms and conditions of employment."

Having defined the triangle of parties in this dispute—the Port Authority, the Panel and the PBA—we turn to the facts underlying this controversy.

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[1] This Instruction was adopted by the Board of Commissioners of the Port Authority in 1976 at a public meeting of the Board; the minutes of that meeting were transmitted to the Governors of both New Jersey and New York and were approved, which made the Instruction effective and in force. *See N.J.S.A. 32:2-6*; *N.Y. Unconsol. Laws* Ch. 151-A § 2 (2007).

B.

In April 1947, the Port Authority entered into an agreement with the City of New York. That agreement provided that the Port Authority would lease and operate the municipal airports then owned by New York City; among them was Idlewild Airport, now known as JFK Airport. Section 11(c) of the agreement stipulates that "[t]he Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises [and that t]he City will have no responsibility for maintaining . . . police personnel in the demised premises." Section 37 of the agreement further provides that

> the Port Authority shall have full power and discretion to proceed with the financing, rehabilitation, expansion, improvement, development, operation and maintenance of the municipal air terminals, and to enter into such contracts, agreements, subleases or other arrangements with respect thereto as it may deem necessary and desirable, and all matters connected therewith, including but not limited to, all details of financing, construction, leasing, charges, rates, tolls, contracts, and operation shall be within the sole discretion of the Port Authority; and the decisions of the Port Authority in connection with any and all matters concerning the municipal air terminals shall be controlling, provided that all such things shall be done by the Port Authority in its own name and on its own credit.

C.

In July 1991, the Port Authority entered into a Memorandum of Agreement with the PBA. That

Memorandum recognized the PBA as the sole and exclusive representative of the Port Authority police officers for collective bargaining purposes. Section XXI(1) of the Memorandum of Agreement explains that, "[d]uring the term of this Memorandum of Agreement, no Police Officer . . . shall be deprived of his employment as a Port Authority Police Officer . . . by reason of the abolition or modification of the requirements for additional police coverage at [JFK] Airport, . . . pursuant to . . . Federal Aviation Regulations." It also states, in Sections XXX(1) and (7), as follows:

> Subject to other provisions herein, and except as otherwise set forth in this Agreement, during the term of this Agreement, there will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other unit work currently and heretofore performed by Police Officers shall be maintained.
>
> . . . .
>
> All existing Police Officer positions and/or assignments shall be maintained during the term of this Memorandum of Agreement in accordance with the Police Position and/or Assignment List agreed upon between the parties so long as the work being performed continues to be performed by or on behalf of the Port Authority.

Section II(1) of the Memorandum of Agreement states that "any such practice, procedure or policy [governing existing terms and conditions of employment of Police Officers] pursuant to any . . . instruction . . . shall not be limited, restricted, impaired, removed or abolished unilaterally." Con-

sistent with that limitation, Section II(2) of the Memorandum of Agreement makes clear that

> [a] charge or complaint that the [Port] Authority has unilaterally limited, restricted, impaired, removed or abolished such a practice, procedure or policy governing an existing term and condition of employment which is not specifically enumerated or set forth in this Memorandum of Agreement shall not be subject to or processed through the grievance-arbitration procedure referred to in Section XXIII of this Memorandum of Agreement.[2]

D.

Starting in 1994, the Port Authority embarked on a process to determine whether to modernize or replace the international terminal at JFK Airport; among the proposals to be considered was the solicitation of private investors. The following year, the Port Authority did solicit in the private sector and received four proposals. In 1997, it accepted a proposal from JFK International Air Terminal LLC (JFKIAT)[3] that provided for the construction of a new international terminal at an overall cost of $1.2 billion.

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[2] Section XXIII of the Memorandum of Agreement specifically provides that "alleged violation[s]" of Section II(1) of the Memorandum of Agreement are exempt from the grievance or arbitration procedures of the Memorandum of Agreement and, hence, lie outside the Panel's limited jurisdiction.

[3] JFKIAT is a limited liability company comprised of three separate business interests: the developer responsible for the construction of the new terminal, the operator responsible for the operation of the completed terminal, and the financing source responsible for the financing of the new terminal, including the issuance of Port Authority municipal bonds.

The Port Authority and JFKIAT entered into an exhaustive lease that outlined each party's obligations in respect of the international terminal at JFK Airport. Stating that "the Port Authority is obligated to have in effect and does now have in effect an airport security plan in accordance with [federal regulations]," the lease recites that "[t]he Security Plan outlines law enforcement requirements of the airport operator and physical barriers and access procedures to monitor and restrict access[.]" Acknowledging that "the implementation, maintenance and operation of the Premises pursuant to the requirements of the Security Plan is essential to the operation of the Premises and of the Airport[,]" JFKIAT agreed to "assume and fulfill all of the Port Authority's obligations and responsibilities under the Security Plan and [to] take all measures required, necessary or appropriate to implement and carry out the requirements of the Security Plan."

E.

Approximately one month before entering into the lease with JFKIAT, the Port Authority met with the PBA, explained the lease proposal for the international terminal at JFK Airport, and assured the PBA that "no Port Authority Police Officers would be displaced from JFK Airport nor suffer any negative impact as a result of" the lease. Those assurances were followed by a Port Authority memorandum dated May 12, 1997 that advised that, effective at noon the following day, JFKIAT would "assume responsibility for the [international terminal, that] police services commensurate with that provided other unit terminals at JFK will be maintained[, and that f]rontage management of pedestrians and vehicles will become the responsibility of [JFKIAT]."

The lease became effective on May 13, 1997 and, from that date forward, JFKIAT assumed all security functions at JFK Airport's international terminal. Although those events required the redeployment of the Port Authority police officers formerly assigned to the international terminal, no police officer lost his or her job; the sole record evidence of any possible impact on the police officers was the unsubstantiated opinion of the chief of the Port Authority police department that, "by redeploying [Port] Authority Police Officers, he was 'certain' that their overtime was reduced."

Six weeks later, the PBA protested. In a letter dated June 24, 1997 and addressed to the Port Authority's director of human resources, the PBA set forth its view that "the Port Authority Labor Relations Instruction and the Memorandum of Agreement between the Port Authority and [the PBA] forbid this unilateral action by the Port Authority." It also asserted that, "without prejudice to [its] right to file an improper practice or grievance[, the] PBA requests immediate negotiations regarding the impact of this decision upon our members[,]" explaining that "[t]he PBA will take appropriate action thereafter." On July 2, 1997, the Port Authority responded, rejecting any claim that the Port Authority had acted improperly, but expressing a willingness to discuss the PBA's concerns "as part of overall negotiations." The PBA did not respond to that invitation. Instead, on July 28, 1997, the PBA filed its improper practice charge against the Port Authority.

The PBA's improper practice charge specifically alleged that

> the Port Authority has either hired, subcontracted, permitted or suffered non-unit personnel to perform PBA unit work. Civilian personnel are directing and controlling traffic and are performing security functions at sites at or near the [international terminal,] which functions have traditionally and historically been performed by the PBA. This action was taken by the employer without any prior negotiation with the PBA in violation of the Labor Relations Instruction and the Memorandum of Agreement.

The Port Authority submitted a blanket denial of those charges, and the Panel assigned the matter to a hearing officer.[4]

After reviewing the factual background and the contentions of the parties, the hearing officer addressed the issues before him. First, he reasoned that the Security Plan work transferred via the lease from the Port Authority to JFKIAT consisted of "functions previously performed by Port Authority Police Officers both inside . . . and in the frontage area [of the international terminal]." He thus concluded that "the disputed work in issue is unit work, as alleged."

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[4] The first hearing officer to whom this matter was assigned conducted two hearing dates, but then resigned his appointment upon being advised that he was being proposed for appointment to a federal post; shortly thereafter, he was appointed to serve as chairman of the National Labor Relations Board. The matter was reassigned to Hearing Officer Irwin Kaplin, who reviewed the evidence and transcripts of the first two hearing dates, conducted further hearings, considered the parties' post-hearings submissions, and filed a report and recommendation in the matter.

However, the hearing officer found that "the record supports the [Port Authority's] contention that with the takeover by JFKIAT of [the international terminal], the [Port] Authority went out of the business of managing and operating that facility[.]" He therefore also found that "the [Port] Authority did not transfer the disputed work." Based on those findings, he concluded that there was no basis for the PBA's improper practice charge.

The hearing officer's analysis did not end there. After assuming the PBA had made out a case that the work was "unit work" and that the Port Authority had transferred it to JFKIAT, he reasoned that the PBA had failed to establish that "the [Port] Authority's decision to do so was a mandatory subject of negotiations[.]" Applying the "*Fibreboard*[5] plus substantial impact" test, he determined that the PBA had failed to satisfy three of the four prongs of that test and, thus, concluded that "the unilateral decision that led to the loss of unit work at [the international terminal] by [Port] Authority Police Officers was not a mandatory subject of negotiations." He recommended that the PBA's improper practice charge be dismissed in its entirety.[6]

The PBA filed exceptions with the Panel. Although the Panel accepted the hearing officer's factual findings, it rejected the majority of the hearing officer's conclusions, concluding instead that "the

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[5] *See Fibreboard Paper Prods. Corp. v. Nat'l Labor Relations Bd.*, 379 U.S. 203 . . . (1964); *City of Jersey City v. Jersey City Police Officers Benevolent Ass'n*, 154 N.J. 555, 575-76, 713 A.2d 472 (1998).

[6] After the hearing officer rendered his report and recommendation, the PBA moved to reopen the hearing. That motion was denied, and that denial was not appealed.

Port Authority violated the Instruction when it transferred PBA unit work to non-unit employees without negotiating with the PBA." It noted that "[t]he initial inquiry in a matter involving the alleged unlawful transfer of unit work is whether the work is, in fact, unit work, i.e., work which historically has been performed by the unit." It cautioned that "[t]he work need not have been exclusively performed by the unit to constitute unit work." It observed that "only the preservation of unit work is negotiable" and that "there is no obligation to negotiate over the decision to eliminate, as opposed to transfer, unit work."

Consistent with the hearing officer's conclusions, the Panel determined that "the work in dispute is unit work." It then addressed "the next threshold inquiry: was the work transferred." It "conclude[d] that it was." Based exclusively on its interpretation of the lease between the Port Authority and JFKIAT, the Panel reasoned that "[t]he work has not been eliminated but rather subcontracted by the Port Authority. Therefore, pursuant to Panel precedent, there has been a transfer of unit work." Because it had "determined . . . that the work in question is unit work and that there has been a transfer," the Panel applied the "*Fibreboard* plus substantial impact" test, explaining that

> [t]he Port Authority was obligated to negotiate about the decision to transfer the work at issue if:
>
> > The Port Authority has not altered its basic operation;
> >
> > The Port Authority has not made a capital investment which, if subject to collective negotiations, would significantly abridge the [Port] Authority's freedom to manage its business;

> The issues which motivated the decision were peculiarly suitable for resolution within the collective negotiations framework; and
>
> The decision substantially impacts upon the wages, hours, [and] terms and conditions of employment, either quantitatively or qualitatively.

It concluded that (1) "[t]he Port Authority has not altered its basic operation as a result of its lease arrangement with JFKIAT[;]" (2) "the issue here did not involve a capital investment which would, if collectively negotiated, significantly abridge the Port Authority's freedom to manage its business[;]" (3) "the issues which motivated the decision were peculiarly suitable for resolution within the collective bargaining process[;]" and (4) "the decision to have the work performed by non-unit [personnel] rather than by Port Authority police officers represented by the PBA had a substantial impact upon the wages, hours and working conditions of the PBA bargaining unit." It thus determined to sustain the PBA's improper practice charge because "the Port Authority violated Instruction Section XI(A)(d) and the Memorandum of Agreement when, without prior negotiations, it transferred the work to JFKIAT." As a remedy, the Panel ordered that the Port Authority "cease and desist from unilaterally transferring PBA unit work to non-unit personnel[;]" that the Port Authority "restore the status quo ante by restoring the unit work at issue to the PBA bargaining unit;" that the Port Authority "negotiate upon request with the PBA before unilaterally changing terms and conditions of employment;" and that the Port Authority post, "at appropriate places of business[,]" a specified notice to all employees consistent with the substantive relief it afforded the PBA.

Seeking a review of the Panel's determination,[7] the Port Authority filed an action in lieu of prerogative writs pursuant to R. 4:69-1 to -7.[8] The trial court determined that "the Panel is an administrative agency created to review employment issues under the Instruction." From that premise, the trial court afforded the Panel the deference New Jersey allows to the determinations of administrative agencies, *see In re Taylor*, 158 N.J. 644, 656, 731 A.2d 35 (1999); *Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot.*, 101 N.J. 95, 103, 501 A.2d 125 (1985), and concluded that "a decision of the Panel will be upheld if it is supported by substantial evidence in the record, and is neither arbitrary, capricious, nor unreasonable." It concluded that "the Final Order and Decision of the Panel is supported by substantial credible evidence in the record and is neither arbitrary, capricious, or unreasonable substantially for the reasons given by the Panel in its Final Decision and Order[.]" It affirmed the Panel's determination.

The Port Authority pressed its appeal to the Appellate Division, presenting a two-pronged attack. First, the Port Authority argued that, under the Instruction, it is afforded unfettered discretion in respect of its "mission and management responsibilities" and that these specifically include "its organization, staffing, planning, operating and finan-

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[7] The Port Authority named only the Panel as a party defendant. The PBA sought, and was granted, intervenor status.

[8] Both *N.J.S.A. 32:1-175* and *N.Y. Unconsol. Laws* Ch. 599 § 1 (1977) list several avenues of review from orders from the Panel, including that such orders "shall be . . . reviewable . . . by action in lieu of prerogative writ[s] in the State of New Jersey[.]"

cial policies[.]" Second, it argued that the Panel's analysis of the lease between the Port Authority and JFKIAT was incorrect as a matter of law, and that the Panel's conclusion that the Port Authority retained a vestigial obligation to provide security to the international terminal was in error. The Appellate Division, in an unpublished opinion that also relied heavily on a deferential standard of review, declared itself "satisfied that the Panel's findings and conclusions of law reached therefrom are unassailable." It thus affirmed the judgment of the trial court.

We granted the Port Authority's petition for certification, 191 N.J. 317, 923 A.2d 232 '2007), and, for the reasons that follow, we reverse the judgment of the Appellate Division, and remand the cause for the entry of an order vacating the Panel's order and dismissing the improper practice charge filed by the PBA against the Port Authority.

II.

The Port Authority initially advanced four grounds for certification. First, it argued that, because the Port Authority was created by the exercise of the sovereign powers of two states which retained a significant portion of their immunity in the Instruction, the Appellate Division did not defer to "established and well recognized governmental prerogatives regarding the manner in which to provide essential governmental services by disregarding express limitations imposed on the Panel in deciding labor disputes." Closely aligned to that argument is the Port Authority's contention that the Appellate Division did not show proper deference to principles of New Jersey and New York law concerning governmental prerogatives in transferring or subcon-

tracting work. Third, the Port Authority urged that the Appellate Division erred in giving deference to the Panel's conclusions of law in respect to the provisions of the lease between the Port Authority and JFKIAT. Fourth, the Port Authority claimed that the Appellate Division failed to properly credit the hearing officer's conclusions, that is, that the Panel, and by extension the Appellate Division, did not determine that the hearing officer's conclusions were not supported by substantial credible evidence or were otherwise arbitrary, capricious or unreasonable.

In its reply brief, the Port Authority pressed its overarching claim: that this case requires that the Court address "the fundamental power and authority of government to make important decisions regarding the manner in which governmental services are provided without being shackled by having to engage in labor negotiations *before* such decisions are made."

According to the Panel, the sole issue in this case is whether the Panel abused its discretion. It claimed that "[t]he Panel's standards under the Instruction for analyzing transfer of unit work allegations have been in place and accepted by the parties for over 25 years" and, thus, no abuse of discretion is present.

The PBA asserted that "[t]he issue is not the manner in which essential governmental services should be provided" as advanced by the Port Authority. In the PBA's view, "[t]he issues in this case are controlled by the historic obligations developed by the Port Authority through its own decision to utilize bargaining unit members to perform specified and limited work" as well as "its own decision to require its sub-lessee to perform that bargaining unit's work without negotiation[.]"

It asserts that, viewed thusly, there is no basis to overturn the Appellate Division's judgment.[9]

We address those issues as follows. First, we determine the appropriate standard of review for determinations made by the Panel. Next, we consider whether the redeployment of the Port Authority police officers from the international terminal was a mandatory subject of collective bargaining at all. Finally, we discuss whether the performance of functions under the Security Plan by the international terminal's new lessee constituted the transfer of "unit work" previously performed by Port Authority police officers and, if so, whether an obligation to collectively bargain that transfer was triggered.

III.

A.

The standard of review to be applied to decisions by the Panel has, to date, avoided judicial scrutiny in New Jersey.[10] As a preliminary matter, that deter-

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[9] We also received and considered post-argument submissions from the Port Authority and the PBA in respect of whether the Port Authority offered to negotiate either the redeployment of the Port Authority police officers or the effects of that redeployment. Nothing in those submissions added to the facts already in the record or to the arguments previously advanced by the parties.

[10] We recognize that, in addition to the unpublished decision of the Appellate Division below, two other unpublished decisions of the Appellate Division have addressed the standard of review applicable to Panel decisions; each has concluded that decisions by the Panel are to be treated as if they were issued by an administrative agency. However, we underscore that "[n]o unpublished opinion shall constitute precedent or be binding upon any court" and that "no unpublished opinion shall be

mination requires consideration of whether the Panel qualifies as an "administrative agency." We conclude that, for purposes of judicial review, the Panel is an administrative agency. The Administrative Procedure Act, N.J.S.A. 52:14B-1 to -25, defines an agency subject to its reach to include "each of the principal departments in the executive branch . . . and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments . . . authorized by statute to make, adopt or promulgate rules or adjudicate contested cases[.]" N.J.S.A. 52:14B-2(a). Although the Port Authority is not constituted as or within a department of the Executive Branch of government, it is to "be regarded as performing an essential governmental function[,]" N.J.S.A. 32:1-35.4, including the authority to "make suitable rules and regulations[.]" N.J.S.A. 32:1-19.[11] Additionally, the

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cited by any court." *R. 1:36-3.* Nevertheless, we note parenthetically that each of those decisions reaches the same conclusion we endorse today in respect of the proper standard of review for Panel determinations. In its reported case law, New York has applied a deferential standard of review to Panel decisions. *See Pagano v. Port Authority*, 270 A.D.2d 206, 705 N.Y.S.2d 230 (N.Y. App. Div. 2000) (applying standard that Panel determination "may not be disturbed since substantial evidence supports [it]"); *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833, 839 (N.Y. 1974) (explaining that administrative tribunal's factual determinations are sustained if supported by substantial evidence, and exercise of discretion by administrative tribunal will be sustained "unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'").

[11] N.J.S.A. 32:1-19 is the codification of Article XVIII of the interstate compact between New York and New Jersey dated April 30, 1921 that created the Port Authority. In contrast, New York codified the entirety of the compact creating the Port

Instruction—which created the Panel and vested it with the power to adjudicate labor disputes—was approved by the Governors of both New Jersey and New York, respectively, thereby giving it force and effect. N.J.S.A. 32:2-6; N.Y. Unconsol. Laws ch. 151-A § 2 (2007). That Instruction authorizes the Panel to adjudicate cases. In the aggregate, then, those considerations lead to the conclusion that Panel decisions presumptively are worthy of the deference afforded decisions by administrative agencies.

Having concluded that Panel decisions are to be measured by the standard applicable to administrative agency decisions, we shift our focus to defining the appropriate standard of review to be applied. In that regard, we recently observed that "[t]he scope of [judicial] review [of administrative agency actions] is limited." *In re Herrmann*, 192 N.J. 19, 27, 926 A.2d 350 (2007) (citing *In re Carter*, 191 N.J. 474, 482, 924 A.2d 525 (2007)). We underscored that "[a]n administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." *Id.* at 27-28, 926 A.2d 350 (citing *Campbell v. Dep't of Civil Serv.*, 39 N.J. 556, 562, 189 A.2d 712 (1963)). We cautioned that "[t]hree channels of inquiry inform the appellate review function:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action;

Authority—including Article XVIII—in one section. See N.Y. Unconsol. Laws ch. 151 § 1 (2007).

> and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Id. at 28, 926 A.2d 350 (quoting *Mazza v. Bd. of Trs.*, 143 N.J. 22, 25, 667 A.2d 1052 (1995)).

Thus, "[w]hen an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." *Ibid.* (citations omitted). Judicial respect for proper administrative agency action runs deep: "Deference controls even if the court would have reached a different result in the first instance." *Ibid.* (citing *In re Taylor*, 158 N.J. 644, 657, 731 A.2d 35 (1999)).

That said, judicial allegiance to the actions of administrative agencies is neither unlimited nor blind. We have "emphasized that the judicial role in this kind of case must be both sensitive and circumspect [because w]e deal here with the regulatory determination of an administrative agency that is invested by the Legislature with broad authority and wide discretion in a highly specialized area of public life." *In re Hunterdon County Bd. of Chosen Freeholders*, 116 N.J. 322, 328, 561 A.2d 597 (1989). Therefore, it is only "in situations where agency expertise is essential towards understanding the proper context of a dispute [that] a deferential standard of review is appropriate." *Ibid.*

B.

The application of this standard of review informs our conclusion that the Panel's determination that "the Port Authority violated the Instruction when it

transferred PBA unit work to non-unit employees without negotiating with the PBA" is not entitled to any special deference and should be rejected. This is because the Panel neither followed the law nor relied on any particularized expertise in reaching its conclusion. In specific, the same organic document that created the Panel—the Instruction—also limits its jurisdiction. In clear and explicit terms, the Instruction states that "the mission and management responsibilities of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall *not* be subjects of negotiation with employee organizations." 'Emphasis supplied). The lease arrangement in respect of the international terminal delegated to the lessee all of the Port Authority's obligations under its lease with the City of New York and, hence, relieved the Port Authority from the day-to-day operational responsibility for that terminal. For that reason, the Port Authority's plan to lease to a private party the whole of the international terminal directly implicated "its organization, staffing, planning, operating and financial policies," a plan that, prior to its implementation, was presented to and approved by the Port Authority's Board and, by the submission and approval of its minutes, by the Governors of both New Jersey and New York. Furthermore, the Panel's decision hinged solely and exclusively on its interpretation of the lease between the Port Authority and JFKIAT, a matter that does not reside within the Panel's unique area of competence. When gauged in the aggregate, then, the Panel's determination must be rejected.

C.

A like result obtains even if one concludes that the Panel did have the authority to substantively determine this matter. We agree with the unanimous determinations of the hearing officer, the Panel, the trial court and the Appellate Division that the security personnel "hired by JFKIAT . . . are performing functions previously performed by Port Authority Police Officers both inside . . . and in the frontage area to [the international terminal]." However, we part company with the Panel's determination that Port Authority police officer work at the international terminal was transferred to JFKIAT in a manner akin to a delegation as opposed to an outright assignment.

Relying on disparate sections of the lease between the Port Authority and JFKIAT, the Panel concluded that the security obligations at the international terminal "ha[d] not been eliminated but rather subcontracted by the Port Authority" to JFKIAT. That conclusion simply is not supported by this record. On the contrary, the record supports the view of the hearing officer in respect of the continuing relationship between the Port Authority and JFKIAT concerning the operation of the international terminal. That is, that under the lease, the Port Authority withdrew from any further operational responsibility for that terminal. In particular, he noted that, "aside from retaining some general oversight of [the international t]erminal . . . as lessor, the [Port] Authority no longer maintains and operates that facility in any cognizable sense."

D.

Moreover, even if one concludes that the Panel had the authority to determine this controversy and that the Port Authority in fact transferred unit work to JFKIAT, the question whether the Port Authority was obligated to collectively bargain that transfer remains. We conclude that, in the circumstances presented, the Port Authority was not required to collectively bargain with the PBA the transfer to JFKIAT of the Port Authority's obligations under the Security Plan in respect of the international terminal.

It is well-settled that employers and employee representatives must bargain with each other in good faith in respect of "wages, hours, and other terms and conditions of employment[.]" *Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 . . . (1958) (quoting Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d)). For that reason, whether an employer can "contract out" work has been determined to be "well within the literal meaning of the phrase 'terms and conditions of employment.'" *Fibreboard Paper Prods. Corp. v. Nat'l Labor Relations Bd.*, 379 U.S. 203, 210 . . . (1964). That overall rule is subject to a significant limitation: "As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp., supra*, 356 U.S. at 349 . . . .

Our jurisprudence has refined that analysis. Thus, we have held that, in the context of public employment, a topic is a proper subject for negotiation "when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject

has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy." *In re Local 195, IFPTE*, 88 N.J. 393, 404, 443 A.2d 187 (1982). Those refinements are necessary because, "[t]o decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer." *Id.* at 404-05, 443 A.2d 187. Thus, "[w]hen the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions." *Id.* at 405, 443 A.2d 187. *See also, City of Jersey City v. Jersey City Police Officers Benevolent Ass'n*, 154 N.J. 555, 568-74, 713 A.2d 472 (1998) (applying *Local 195* negotiability test).

In the line of authority developed by the Panel, the aggregate of those principles is referred to as the "*Fibreboard* plus substantial impact" test.[12] That test was developed to "balance[] the right of employees to engage in collective bargaining to preserve unit work against the right of the Port Authority to manage its operations." *In re an alleged Improper Practice under Section XI(A)(d) of the Port Authority Labor Relations Instruction,* 94 PAERP 21, at 16 (1998). In disputed matters before the Panel concerning transfers of work, once it is determined that the work at issue is "unit work" and that the unit work has been transferred from employees covered by

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[12] The Panel first developed this test in *The Lieutenant's Case,* 77 *PAERP* 6 (1978).

a collective bargaining agreement, "[t]he test requires the Panel to perform the following four-part analysis:

> 1. Was there a basic alteration of the employer's operation?
>
> 2. Was there a capital investment involved, which would, if collectively bargained, significantly abridge the company's freedom to manage its business?
>
> 3. Were there issues which motivated the decision[,] such as reducing the work force, decreasing fringe benefits, and eliminating overtime payments, peculiarly suitable for resolution within the collective bargaining agreement?
>
> 4. Whether the removal of work from the bargaining unit has a significant impact upon the bargaining unit?

[*Ibid.*]

In its application, "[t]he test is straight-forward." *Ibid.* "If the answer to either of the first two questions is 'yes,' the transfer of unit work is not a mandatory subject of negotiations." *Ibid.* "On the other hand, if the answers to the first two questions are 'no,' and the answers to *both* questions 3 and 4 are 'yes,' the Port Authority must negotiate with the bargaining unit before it may transfer the work." *Id.* at 16-17. Finally, "[t]he charging party bears the burden of proving each element of this four-part framework." *Id.* at 17.

Subjecting the record before us to the "*Fibreboard* plus substantial impact" test leads to the conclusion that the transfer of the Security Plan work at the international terminal from the Port Authority to JFKIAT was not a mandatory subject of negotiations.

On the first question—whether there was a basic alteration of the Port Authority's operations—the answer must be "yes." No doubt, by transferring all obligations in respect of the international terminal to JFKIAT, thereby freeing itself of the operational responsibilities for that terminal, the Port Authority indisputably altered its operations in a most basic and fundamental manner. Second, the transaction with JFKIAT involved a $1.2 billion lease agreement that required an $82 million capital investment by JFKIAT in lieu of the Port Authority itself having to replace roadways and parking at the international terminal; the Port Authority also retained a $15 million soil remediation obligation. Those facts compel the conclusion that, in the Port Authority-to-JFKIAT lease transaction, there was a capital investment involved, which would, if collectively bargained, significantly abridge the Port Authority's freedom to manage its business.

According to the Panel's own precedent, an affirmative answer to either of the first two questions resolves the inquiry in favor of ruling that the transfer of the unit work is not a mandatory subject of negotiations. *Id.* at 16. That conclusion is buttressed further by applying the third and fourth parts of the "*Fibreboard* plus substantial impact" test. In respect of the third prong, the hearing officer found that the international terminal "was the anomaly while the [Port] Authority operated the facility." This is so because, of the nine terminals at JFK Airport, the international terminal was the sole remaining terminal operated by the Port Authority; by that point, all others had been leased to third parties. As the hearing officer succinctly described, "once operational control passed to JFKIAT, [the international terminal] became the mirror facility to

the other eight unit air terminals where security and traffic control are also exclusive functions of the unit air terminal lessee/operators." Finally, the removal of the work from the PBA did not have a significant impact on the PBA. The record is clear that not one police officer lost his or her position as a result of the lease of the international terminal. The most the record contains is the unsubstantiated opinion of the Port Authority's police chief that the police officers' overtime somehow was reduced by reason of the JFKIAT lease.

In sum, we concur with the hearing officer's well-supported conclusions that

> the PBA failed to satisfy its burden of establishing that the Port Authority hired, subcontracted, or permitted civilian [personnel] to perform unit work previously performed by Port Authority Police Officers at the [international terminal]. Under a sublease negotiated by the Port Authority and a consortium known as JFKIAT, the latter entity assumed operational control and management of the [international terminal]. JFKIAT was solely responsible for hiring and assigning the disputed work to the [personnel] in issue. It is not alleged nor does the record reveal that the Port Authority and JFKIAT are joint employers.

He further found that "the Port Authority's unilateral decision to sublease operational control and management of the [international terminal] to JFKIAT was not a mandatory subject of negotiations" and "that the Port Authority did not violate the work preservation provision contained in the Memorandum of Agreement or Section XI(A)(d) of the Instruction[.]" We adopt those conclusions as our own.

IV.

The judgment of the Appellate Division is reversed, and the cause is remanded to the Law Division for the entry of an order vacating the Panel's order and dismissing the improper practice charge filed by the PBA.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, and HOENS join in JUSTICE RIVERA-SOTO's opinion. JUSTICE ALBIN filed a separate dissenting opinion in which JUSTICE WALLACE joins. JUSTICE LONG did not participate.

JUSTICE ALBIN, dissenting.

Until today, the Port Authority Employment Relations Panel (Panel) was widely recognized as having both the expertise and authority to determine the types of labor disputes that are subject to collective bargaining. In a thorough and thoughtful opinion supported by its own precedents, the Panel came to the unremarkable conclusion that the Port Authority of New York and New Jersey could not privatize the work of Port Authority police officers without first engaging in good faith negotiations with the officers' bargaining unit. Both management and the union delegated to the Panel the authority to resolve the very fact-sensitive labor-management dispute present in this case. The trial court and Appellate Division accorded the Panel's findings the traditional deference owed to an administrative agency. The majority has ignored that deference and substituted its own judgment to reach a different result. In doing so, and in reversing the decisions of not only the Panel but also the trial court and Appellate Division, the majority has swept aside the obligation of management—pursuant to a collective negotiations agreement—to bargain in good faith with its employees for the purpose of reaching an equitable resolution of a labor dispute. I therefore respectfully dissent.

I.

In 1947, New York City and the Port Authority entered into an agreement (1947 Agreement) that placed what is now known as JFK Airport within the Port Authority's jurisdiction. In accordance with the 1947 Agreement, the Port Authority is required to "provide police for patrolling, for guarding and for traffic control" at JFK Airport. *In re an Alleged*

Improper Practice under Section XI(A)(d) of the Port Auth. Labor Relations Instruction, 97 PAERP 28, at 5 (2001).

In a document entitled the Port Authority of New York and New Jersey Labor Relations Instruction (Instruction), the Port Authority and the unions servicing JFK Airport, including the Police Benevolent Association (PBA), created the Panel to resolve labor disputes arising from their collective negotiations agreements. In the Instruction, the Port Authority and the PBA delegated to the Panel the authority to make "determinations as to mandatory and non-mandatory subjects of negotiation." For over thirty years, the Panel has used its specialized expertise to develop a body of law to resolve labor disputes between the Port Authority and its union employees. The Instruction states that the Panel is not bound by either New Jersey's or New York's public sector labor laws. In accordance with the Instruction, the Panel applied its own case law to decide the dispute in this case.

That labor dispute involves an allegation that the Port Authority failed to negotiate replacing two hundred police officers—staffing the International Arrivals Building 'IAB) at JFK Airport—with non-union employees. The genesis of the dispute is a long-term lease agreement between the Port Authority and private investors (JFKIAT) to construct a new IAB. The lease agreement provided that JFKIAT "shall furnish adequate security and guard service or such comparable means *as approved by the Port Authority* . . . ." (Emphasis added).

As noted, pursuant to the 1947 Agreement with New York City, the Port Authority is duty bound to provide security at JFK Airport. In view of the 1947

Agreement, no lease with a private entity can strip the Port Authority of its non-delegable duty to furnish that security. Significantly, the Port Authority does not dispute that following its lease with JFKIAT, it remains responsible for security at the IAB, where the Port Authority's police officers perform "a variety of security functions," including traffic control in front of the IAB. *Id.* at 6-7. After the lease agreement went into effect, the Port Authority transferred PBA police officers to other areas of JFK Airport while JFKIAT hired non-union security workers in their place. The Port Authority claims that it did not have to negotiate with the PBA before making that move because "mission and management responsibilities of the [Port] Authority" are not subject to negotiations.

The Instruction by which the Port Authority must abide, however, empowers the Panel to decide which management decisions are "mission and management responsibilities." Here, the Panel focused on the following language in the collective negotiations agreement:

> [T]here will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other unit work currently and heretofore performed by Police Officers shall be maintained.
>
> . . .
>
> All existing Police Officer positions and/or assignments shall be maintained . . . so long as the work being performed continues to be performed by or on behalf of the Port Authority.

[*Id.* at 10-11.]

That language persuaded the Panel that the Port Authority was required to engage in good faith negotiations with the PBA before transferring the security functions at the IAB from police officers to non-union workers. *Id.* at 24. Ultimately, the Panel concluded that the Port Authority violated its collective negotiations agreement with the PBA by failing to do so. *Ibid.*

This Court is obliged to defer to the Panel's interpretation of the collective negotiations agreement so long as that interpretation is "reasonably debatable." *Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n*, 192 N.J. 489, 496, 933 A.2d 589 (2007) (holding that in public sector labor arbitrations "'the scope of review in matters of interpretation is confined to determining whether the interpretation of the contractual language is reasonably debatable'" (quoting *Bd. of Educ. of Alpha v. Alpha Educ. Ass'n*, 190 N.J. 34, 42, 918 A.2d 579 (2006)). I agree with the majority that the Panel's ruling must be "'sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" *Ante* at ___ (slip op. at 21) (quoting *In re Herrmann*, 192 N.J. 19, 27-28, 926 A.2d 350 '2007)). Unlike the majority, I conclude that the record soundly supports the Panel's decision.

II.

In reaching its decision, the Panel applied its own well-established case law developed over three decades. *See* 97 PAERP 28, at 11 (listing numerous prior cases in which Panel articulated and applied standard). First, the Panel determined that the work now being performed by the private guards is "unit work"—that is, work that PBA officers had

customarily performed at the IAB. *Id.* at 11-12. Second, the Panel found that through its lease with JFKIAT, the Port Authority continued to exercise control over the security functions at the IAB. *Id.* at 14-15. In other words, by the very terms of the IAB lease, the Port Authority did not get out of the business of providing security at the IAB. *See ibid.* In place of the police officers, the Port Authority allowed JFKIAT to hire non-union security guards. Therefore, the Panel reasoned that the Port Authority transferred unit work without first engaging in good faith negotiations with the union. *Ibid.*

The Panel then applied its own standard—a modified version of the one established in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 . . . (1964)—a standard that the Panel has described as the "*Fibreboard* plus substantial impact test." 97 PAERP 28, at 20 (noting that Panel first enunciated its test in 1978 case, 77 PAERP 6). Under that test, the Port Authority is required to negotiate the decision to transfer unit work if:

> [1] The Port Authority has not altered its basic operation;
>
> [2] The Port Authority has not made a capital investment which, if subject to collective negotiations, would significantly abridge the Authority's freedom to manage its business;
>
> [3] The issues which motivated the decision were peculiarly suitable for resolution within the collective negotiations framework; and
>
> [4] The decision substantially impacts upon the wages, hours, terms and conditions of employment, either quantitatively or qualitatively.

[*Ibid.*]

First, the Panel determined that the Port Authority did not alter "its basic operation as a result of its lease arrangement with JFKIAT." *Id.* at 21. The Port Authority is obliged pursuant to its 1947 Agreement with New York City to provide security at JFK Airport—an obligation that did not change because the Port Authority entered into the lease with JFKIAT. *Id.* at 5, 21. As the Panel noted, the security work inside and outside the IAB previously performed by police officers in accordance with the 1947 Agreement was merely reassigned to non-union personnel. *Ibid.*

Second, the Panel concluded that the Port Authority did not make "a capital investment which would, if collectively negotiated, significantly abridge the Port Authority's freedom to manage its business." *Id.* at 21. The Panel reached that conclusion because the capital investment to construct a new IAB did not concern the performance of security functions at the IAB and was "irrelevant to the unit work issue in dispute." *Ibid.* Simply put, the Panel found that negotiations regarding the transfer of work to private security guards would not have impeded the capital investment. *Id.* at 21 & n.7. In that regard, the Panel emphasized the narrowness of its ruling, noting that its decision neither required the Port Authority to negotiate with the union "over its financial arrangements under the JFKIAT lease" nor "prevent[ed] the Port Authority from deciding to have JFKIAT operate the IAB." *Id.* at 21 n.7. Rather, the Port Authority's obligation to negotiate with the union, according to the Panel, arose out of its continuing duty to provide security inside and traffic control outside the IAB. *Ibid.* Thus, the Panel maintained that collective negotiations with the PBA would not have "significantly abridge[d] the Port

Authority's freedom to manage its business." *Id.* at 22 n.7.

Third, the Panel found that the financial considerations motivating the Port Authority's decision to transfer the jobs of police officers to private security guards "were peculiarly suitable for resolution within the collective bargaining process." *Id.* at 22. According to the Panel, the "impact of competing wage rates" between union police officers and non-union security employees is a proper subject "for resolution within the collective negotiations framework." *Ibid.; see also ante* at (slip op. at 25) ("It is well-settled that employers and employee representatives must bargain with each other in good faith in respect of 'wages, hours, and other terms and conditions of employment[.]'" (quoting *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 . . . (1958))).

Last, the Panel clearly believed that lower paying non-union security jobs threatened to eventually drive down the wages of PBA police officers.[13] 97 PAERP 28, at 22-23. From that perspective, the Panel deduced that "the work performed by non-unit security guards rather than by Port Authority police officers . . . had a substantial impact upon the wages, hours and working conditions of the PBA bargaining unit." *Id.* at 23.

Applying all of those factors in a highly fact-intensive analysis, the Panel concluded that the Port Authority had violated its Agreement with the PBA by unilaterally transferring unit work without first

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[13] It is also noteworthy that the hearing officer acknowledged that "Port Authority witnesses admitted that the redeployment of the IAB Police Officers to other terminals at JFK Airport saved the Port Authority in overall overtime payments."

engaging in good faith negotiations. *Id.* at 23-24. Our Court has observed that "[q]uestions concerning whether subjects are mandatorily negotiable should be made on a case-by-case basis." *Troy v. Rutgers*, 168 N.J. 354, 383, 774 A.2d 476 (2001). It bears mentioning that, in its decision-making, the Panel has served as an honest broker, finding some Port Authority decisions to be within managerial prerogative and others subject to negotiations. *See* 97 PAERP 28, at 12, 13, 17-18, 19-20, 21 n.6.

III.

The Panel's decision simply implemented the long-held notion that management and labor should sit across the table and collectively bargain in good faith. *See Fibreboard, supra*, 379 U.S. at 211 . . . (noting that "one of the primary purposes" of our national labor relations policy "is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation"). That approach does not imply a pre-ordained result favoring the union.

In substituting its judgment for that of the Panel, the majority ignores that the Instruction to which the Port Authority and the PBA are bound authorizes the Panel to resolve this very dispute. The majority submits that the Panel should not have been accorded deference because it lacks the expertise to interpret a contract in the form of a lease. *Ante* at ___ (slip op. at 24). However, in exercising its jurisdiction over labor disputes, the Panel must interpret contracts of all types, including collective bargaining agreements and employment contracts. Interpreting the JFKIAT lease was integral to understanding the obligations of the Port Authority under the collective negotiations agreement with the

PBA. For that reason, the Panel fulfilled its duty by considering all of the relevant documents, including the lease, to determine the Port Authority's responsibilities pursuant to the collective negotiations agreement. *Cf. Band-Age, Inc.*, 217 N.L.R.B. 449, 449 (1975) 'interpreting lease as part of determining obligations under collective bargaining agreement), *enforced,* 534 F.2d 1 (1st Cir.), *cert. denied*, 429 U.S. 921 . . . (1976).

Whether a particular employer decision is the subject of mandatory bargaining is plainly within the expertise of the Panel. Here, the Panel made a fact-sensitive determination consistent with its own precedents. Recognizing the expertise of the Panel and the substantial deference owed its decision, both the Law Division and Appellate Division affirmed the Panel, finding that its decision was not arbitrary, capricious, or unreasonable. Indeed, the Appellate Division deemed the Panel's "findings and conclusions of law" to be "unassailable."

The majority's needless overturning of the Panel's holding that the Port Authority was required to engage in good faith negotiations with the PBA before transferring work performed by union employees to non-union employees is completely at odds with the respect our Court typically gives to administrative agencies. I agree with the trial court and Appellate Division that the Panel's decision is amply supported by the record.

For that reason, I respectfully dissent.

Justice Wallace joins in this opinion.

APPENDIX B

PORT AUTHORITY
EMPLOYMENT RELATIONS PANEL
Hearing Officer's Report

Case No. I P-97-28 (PBA)

IN THE: MATTER OF AN ALLEGED IMPROPER PRACTICE UNDER SECTION XI, PARAGRAPH A(d) OF THE PORT AUTHORITY LABOR RELATIONS INSTRUCTION, PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.,
Charging Party,

-and-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

REPORT AND RECOMMENDATIONS OF HEARING OFFICER IRWIN KAPLAN

APPEARANCES

For the Charging Party	Alfred Osterwald, Esq., and John McAusland, Esq.
For the Respondent	Harry M. Agnostak, Esq.

On November 7, 1997, John C. Truesdale was selected by the Port Authority Employment Relations Panel ("the Panel") to serve as Hearing Officer, pursuant to Article XI, Paragraph D(3) of the Port Au-

thority Labor Relations Instruction ("the Instruction"), to hear and issue a Report and Recommendations in the above-captioned improper practice charge filed by the Port Authority Police Benevolent Association (also "Union" or "PBA"). (Joint Exhibit "Jt Exh" 2). Subsequent to a request by the Port Authority (also "Authority" "Charging Party" or "Respondent") for certain particulars and compliance therewith by the PBA, the Respondent filed its answer on February 13, 1998. (Jt Exh 3). After two hearing sessions (October 1 and October 28, 1998), Hearing Officer Truesdale learned that the President of the United States intended to appoint him as a Member of the National Labor Relations Board ("NLRB"). The Panel by letter to the parties dated November 10, 1998 noted "A Presidential Appointee in such a full time position cannot engage in outside employment." There, the Panel also notified the parties of the appointment of the undersigned as a replacement hearing officer for Mr. Truesdale.[1] (Jt Exh 12). Further hearings on the instant improper practice charge were held before the undersigned, without objection, on November 24, 1998 at the offices of the PBA, in Englewood Cliffs, New Jersey, and February 11 and 12, 1999, and March 24, 1999, at the Newark Airport, Building #10, third floor conference room.

The parties adduced testimony, cross-examined witnesses and introduced exhibits. Post-hearing briefs were scheduled to be post-marked by the close

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[1] The Panel in doing so noted, inter alia, that Mr Truesdale had turned over to the undersigned the transcripts and exhibits from the first two hearing dates (October 1 and October 20, 1998) and that the case would be permitted to go forward without interruption. (*Id.*). Mr Truesdale was appointed to serve as chairman of the NLRB on December 4, 1998.

of business on Friday, May 14, 1999 and reply briefs, by the close of business on Monday, May 31, 1999. These dates were subsequently extended to June 9, 1999 and June 25 1999, respectively, at the request of the parties due to their late receipt of the record (transcripts). The hearing was closed on June 27, 1999. upon receipt of the reply briefs.

FINDINGS OF FACT

Pleadings:

1 The underlying charge was filed on July 28, 1997, alleging that the employer violated Section XI (A) (d) of the Instruction and the Past Practice Clause of the Collective Bargaining Agreement (herein the "CBA" or the "Agreement"). (Jt Exh I). In a Rider attached to said charge, the PBA noted as follows

> The PBA has learned that the Port Authority has either hired, subcontracted, permitted or suffered non-unit personnel to perform PBA unit work. Civilian personnel are directing and controlling traffic and are performing security functions at sites at or near the International Arrival Building which function have traditionally and historically been performed by the PBA. This action was taken by the employer without any prior negotiation with the PBA in violation of the Labor Relations Instruction and the Memorandum of Agreement. (*Id.*).

2 By letter dated November 19, 1997, counsel for the Respondent filed a request to then hearing Officer Truesdale for an order directing the PBA to supply certain Particulars of the instant charge pursuant Rule 304 (B) of the Panel's Rules of Procedure.

There, counsel for the Respondent asked for, inter alia, the following Particulars:[2]

1 On what specific day(s) and at what time(s) have civilian personnel directed and controlled traffic at sites near or at the Kennedy International Arrivals Building (IAB)?

2

3 In what specific manner were civilian personnel directing or controlling traffic at the IAB on the specific day(s) referenced above in Question 1?

4 Who are the specific civilian personnel who are controlling or directing traffic at the IAB?

5 On which specific streets, roadways ramps or other areas at or near the IAB have the civilian personnel referenced above controlled or directed traffic on the dates referenced above?

6 What specific security functions have civilian personnel performed?

7 On what specific days and at what specific sites at or near the IAB have civilian personnel performed security functions[?]

8

9 In which specific manner have civilian personnel performed security functions at or near the IAB?

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[2] Hearing officer Trusdale issued an Order to Show Cause dated February 5, 1998, noting, inter alia, that he had previously directed the PBA to supply the information specified in the requested Particulars with the exception of Items 2, 8, and 11 (See Order to Show Cause, n.3).

10 What specific police Officer traffic control and/or direction work and what specific Police Officer security function work at the IAB have civilian personnel performed?

11

3 By facsimile and mail regular dated February 10, 1998, counsel for the PBA filed Particulars as follows:

1 The PBA believes that civilian personnel have performed PBA unit work since the Port Authority transferred operation of the IAB to a private company as discussed in the Port Authority Memorandum previously released in answer to this inquiry. Specifically, on May 14, 1997 and again on May 20, 1997, Delegates at Kennedy International Airport observed civilian security personnel guarding the frontage at the International Arrivals Building. To our knowledge, this has continued on a round-the-clock daily basis, since this time.

2 Stricken, by order of the Hearing Officer.

3 In the same manner in which Port Authority Police Officers had formerly done so.

4 This information in the possession of the Port Authority. We have sought this information by letter dated November 11, 1997.

5 Roadways adjacent to the International Arrivals Building, including but not limited to Air terminal highway, "A" Road, Terminal Road, West Courtyard, restricted mall for busses and taxis, and the Passenger Pickup Areas A, B, C, D, E, and F.

6 Civilians have been seen performing former Police security functions, including but not limited to Police Post 10, Interior security at the arrivals Area, performing deterrence and security function for arriving passengers Post 11 and 17 East and West Courtyard General Security, securing vehicles and patrolling parking lot in West Courtyard. Security functions, including deterrence, on terminal frontage for arriving departing/ passengers.

7 See #1.

8 Stricken by order of the Hearing Officer.

9 In the same manner in which Port Authority Police Officers had formerly done so.

10 See answers to the above inquires.

11 Stricken by order of the Hearing Officer.

4 The Respondent filed its Answer on February 13, 1998 "den[ying] each and every allegation" in the Charge and the Responses to the Authority's Motion for Particularization of the Charge. As a separate defense, the Respondent maintains that the work in question is performed for an entity which is not the Authority and, as such, cannot serve as a basis for an actionable claim of unit work transfer under the Instruction. (Jt Exh 3).

Background and Sequence of Events:

5 John F. Kennedy International Airport ("JFK" or "Airport"), is under a long-term lease by the Port Authority from the City of New York. (PBA Exh 7). In 1994, the Port Authority approached the Board of Commissioners ("Board") to seek planning authorization to determine whether "modernization" or "replacement" was the appropriate vehicle for changes at

Terminal 4 ("IAB").[3] (Tr 444). The Board approved such planning but suggested that the Authority solicit private investors and allow them to develop Terminal 4 in accordance with the Authority's projections vis-a-vis traffic and building usage. (*Id.*). In 1995, the Authority solicited private sector interest and received four proposals. In 1997, after a period of evaluation of the various proposals, the process was completed with the work in question leased to a consortium of airport developers and operators known as JFK International Air Terminal LLC ("JFKIAT"). (Tr 477-478, PBA Exh 9, p 10). JFKIAT is a partnership comprised of three business entities LCOR, Schiphol and Lehman Brothers. (Tr 478). LCOR was to be the developer responsible for the construction and to raise funding for the IAB and Schiphol was to be responsible for the actual operation of the terminal. (Tr 446). Lehman Brothers would provide financing for the undertaking, including the issuance of Port Authority municipal bonds. JFKIAT would construct the new terminal at a cost of $1.2 billion. (Tr 467).

6 The expenditures for the foregoing redevelopment of the IAB included $82 million for demolishing and rebuilding roadways leading to the terminal as well as improving the public parking area in front of Terminal 4. (Tr 450, 482-483). In addition, the Authority had a remediation obligation of $15 million to JFKIAT to remove contaminated soil from the Terminal 4 leasehold. (Tr 449-450).

7 Prior to the IAB leasehold passing to JFKIAT in May 1997, the Authority had long managed and

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[3] At JFK there are nine air terminals. (Transcript "Tr" 479-480).

operated the terminal. As such, the Authority provided all maintenance and cleaning services within the building, either with its own employees or with contract employees. (Tr 329, 476). In addition, the Authority had a contract with FJC Security, a private sector security company, to provide certain ancillary security functions, such as, responding to door breaches and alarms. (Tr 126-130, 476-477). The Authority also had its own police officers (PBA members) handle a variety of security functions within the terminal and traffic direction and control in front of said terminal, sometimes referred to as "frontage."[4] (Tr 34-35). In all, the Authority employed approximately 200 employees at the IAB. (Tr 337). The tenants at the IAB included approximately 40 airlines and a number of retail operations and restaurants for which said tenants paid rent to the Authority. (Tr 329). These tenants were responsible for cleaning and maintaining their own space. However, if electrical, flooding or other physical or maintenance problems of a sub-

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[4] In principal part, it is the traffic direction and control that was performed by the PBA members stationed at the frontage to the IAB that was allegedly "transferred" to JFKIAT or more particularly, to Schiphol that is in dispute in the instant case. According to the PBA, the frontage is also an "air terminal highway," as characterized by the statutes of the States of New York and New Jersey. As such, it is part of a roadway system under the control and jurisdiction of the Port Authority Police Department. (PBA Brief, at p 7). The Respondent contends that the frontage at the IAB is part of JFKIAT's leasehold and under the latter's control. According to Respondent, "[r]oadways which are contained within terminal leaseholds are never designated as air terminal highways." (Respondent Brief, at p 6). The frontages at the other terminals at JFK are part of private leaseholds. (Tr 480, 530). There, private security guards are utilized to direct traffic and to direct patrons to parking. (Tr 530). This issue will be discussed more fully infra.

stantial nature were involved, such matters were within the province of the Authority to remedy. Also, common areas shared by tenants were the responsibility of the Authority. (Tr 330-333). As for security, the airline tenants had responsibility at the screening points where passengers and their handheld luggage were monitored through an x-ray machine and magnetometers. (Tr 333-334, 109-110).[5]

8 As noted above, prior to May 1997, police officers were employed both within the interior of the IAB as well as stationed at the frontage of the building. The job functions of police officers are spelled out in pertinent part, in the Memorandum of Agreement ("MOA") between the Authority and PBA. (Jt Exh 11, Document A, Specification 2600, pp 205-208). There, inter alia, the following is noted:

TYPICAL DUTIES

1 Patrols assigned posts by foot or automobile, either in uniform or plainclothes. Observes the flow of vehicular traffic and takes appropriate actions to prevent violations of traffic regulations. Patrols assigned areas to protect property, to prevent unlawful conduct and incidents, and to caution or apprehend violators.

2 Directs the movement of vehicular and pedestrian traffic at or in the vicinity of a facility. Controls and expedites traffic movement

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[5] Under Federal Aviation Administration ("FAA") regulations, the, airport operator (here, the Authority) is required to have a law enforcement response at each screening point (also referred to as FAR posts) within a specified time. It is undisputed that the FAR post function was and continues to be performed by a PBA member. (Tr 109-110).

in accordance with established patterns of traffic flow and routing under normal conditions, but in unusual circumstances devise temporary traffic regulation methods.

4 Enforces traffic regulations as a peace officer in the State of New Jersey and a Police Officer in the State of New York. Issues summonses, and prefers charges against violators of municipal and state statutes, and gives testimony as required.

5 May perform duties such as the following on specific assignments

d Performs plainclothes operations, including Tactical Patrol/anti-crime unit operations currently and heretofore performed by Police Officers.

6 Is responsible for the protection of life and property at a facility on an assigned tour. Supervises and participates in patrolling areas, observing vehicular and pedestrian traffic, preventing crime, answering inquires and performing related police duties.

* * *

9 In March or April 1997, representatives of the Port Authority Police Headquarters met with PBA representatives to assure them that no Port Authority Police Officers would be displaced from JFK Airport nor suffer any negative impact as a result of privatization at the IAB. (Tr 528-529).

10 By Memorandum dated May 12, 1997 to "All [Police Officer] Members of the Command," and the PBA were notified of "Privatization of International Arrivals Building Complex." (Tr 36, PBA Exh 2).

There, the notification, in pertinent part, stated as follows:

> Effective 1200 hours, Tuesday, May 13, 1997, the International Arrivals Building Complex ("Terminal 4") will be turned over to private enterprise. Schiphol USA, Inc, doing business as "JFKIAT" (International Arrivals Terminal), will assume responsibility for the International Arrivals Building, East and West Wing Departure Buildings, the IAB ramp and associated gates and hardstands, and IAB roadway system.
>
> Terminal 4 becomes a unit terminal building and police services commensurate with that provided other unit terminals at JFK will be maintained. Frontage management of pedestrians and vehicles will become the responsibility of the terminal operator. This includes the TR Road the Courtyards, the restricted malls and the A Road along the entire length of the Terminal 4 complex.
>
> New roll calls are being prepared to reflect the change in status of Terminal 4. These will become effective with 3x11 tour on Tuesday, May 13, 1997.
>
> Courtyard passes will no longer be issued by Port Authority Police for parking in the west and east courtyards. (*Id*).

11 As testified by PBA Executive Director, Dom Evangelista, police officers who formerly maintained posts inside the IAB (except for FAR posts), as well as those stationed outside in frontage management of pedestrians and vehicles, were removed and replaced

by non-unit or civilian security personnel.[6] (Tr 39-43, Tr 109-110). To accomplish this, Schiphol contracted with FJC Security, the same company which had provided civilian guards for the Authority prior to May 13, 1997. (Tr 126-129). None of the police officers were terminated but were redeployed within Kennedy Airport. (Tr 118-119, 528-529). In a letter to Louis LeCapra, Respondent's Director of Human Resources, dated June 24, 1997, PBA's President, Gus Danese responded to Respondent's notice of privatization at the IAB, as follows:

> We have received a copy of a memorandum announcing the privatization of the International Arrivals Building. This memorandum also indicates that elements of our unit work are being subcontracted. We believe that the Port Authority Labor Relations Instruction and the Memorandum of Agreement between the Port Authority and our organization forbid this unilateral action by the Port Authority.
>
> Beyond our right to participate through negotiations in the decision made by the Port Authority, this decision has a separate and negotiable impact upon the terms and conditions of employment of our members. Thus, without prejudice to our right to file an improper practice or grievance regarding the unilateral decision of the Port Authority, the Port Authority PBA requests immediate negotiations regarding the impact of this

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[6] In March 1998, Evangelista also visited the IAB and took a series of photographs that captured civilian security guards engaged in various pedestrian and vehicular traffic control function that had [been] performed by Officers prior to May 13, 1997. (Tr 94-95, PBA Exh's 10-29).

decision upon our members. The PBA will take appropriate action thereafter.

Please advise us regarding the Port Authority's position with respect to negotiations forthwith. (PBA Exh 3).

12 Director LaCapra responded by later dated July 2, 1997. (PBA Exh 4). There, Director LaCapra stated that he was unaware of any impact upon terms and conditions of PBA members flowing from the decision in question but indicated a willingness to discuss the matter with the Union "as part of overall negotiations." (PBA Exh 4).

13 The Port Authority negotiated the effects of its decision to sublease the IAB to JFKIAT with representatives of the Transport Workers Union ("TWU") and the Building Trades Union ("BTU"). (Tr 452-454). The union members were given the option of a buyout (severance pay) or to work somewhere else within the Port Authority. (Tr 344-346). Some of the union employees also accepted employment at Schiphol. (Tr 346-346). Such negotiations did not take place with the PBA.[7]

14 The work preservation provision relied on by the PBA in support of its contention that the alleged transfer of unit work performed by Police Officers to

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[7] Counsel for the PBA noted that the Port Authority never adequately explained why it was obligated to negotiate with the TWU and BTU but was not obligated to negotiate with the PBA as a result of the same transaction. (PBA Brief. at 23). Counsel for the Port Authority counters, noting, inter alia, that the PBA had not demanded to bargain over the effect, if any, of its decision to cease operating Terminal 4. (Respondent Reply Brief at 2).

non-unit employees was in violation of the MOA and the Instruction states, in pertinent part, as follows:

XXX Transfer of Unit Work

1 Subject to other provisions herein, and except as otherwise set forth in this Agreement, during the term of this Agreement, there will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other unit work currently and heretofore performed by Police Officers shall be maintained. (Jt Exh 11, at 63).

PRINCIPAL CONTENTIONS OF THE PARTIES

PBA'S CONTENTIONS

In essence, the PBA maintains that when the Port Authority determined to sub-contract the operation of the IAB, it was required under the Instruction to negotiate with the PBA concerning the sub-contracting of PBA unit work to non-unit employees of the sub-contractor. (PBA Brief at 1).

A The Unit Work in Question prior to May 13, 1997

1 According to the PBA, "the evidence and testimony adduced at the hearing in this matter clearly demonstrated that members performed unit work at the IAB at all times prior to May 13, 1997." (PBA Brief, at 9). In this connection, Dominick Evangelista, former President of the PBA and long-time member of the Port Authority Police Department testified to the variety of unit work performed by Port Authority Police Officers both inside the IAB and on the roadways outside (the frontage area), which duties are also listed in the PBA's job specification.

The unit work so performed by Police Officers at the IAB included foot and vehicle patrol to control the flow of pedestrian and vehicular traffic. Police Officers performed foot patrol in the interior and exterior of the IAB to also protect property and deter unlawful conduct and caution or apprehend violators (*Id.*). Individuals referred to as "hustlers," persons seeking to defraud travelers by various scams or providing illegal taxi rides to Manhattan were frequently monitored and eliminated by Police Officers at the IAB. (PBA Brief, at 10). Counsel for the PBA noted that in material part, the testimony of Evangelista was variously confirmed by Authority management Chief James Romito, Chuck Seliga, the General Manager of Kennedy Airport, Robert Kelly, Director of Aviation of the Port Authority, and Police Inspector Joseph Morris. (PBA Brief, at 11-13).

2 Prior to May 13, 1997, Police Officers were detailed to work at the IAB every day to perform the various traffic and traffic-related tasks set forth above. As testified by Sergeant Schaffer, as many as sixteen Police Officers might be scheduled to work at IAB to fulfill such responsibilities. (PBA Brief, at 10).

In sum, the PBA maintains that the record clearly established that Port Authority Police Officers patrolled the frontage and interior of the IAB prior to May 1997. The record also disclosed that in doing so and in carrying out other functions listed in their job specification, the functions performed by PBA members at the IAB were "unit work and subject to the Panel's Unit work transfer decisions. (PBA Brief, at 13).

B The IAB Following May 13, 1997

1 The sublease with Schiphol to operate the IAB complex was effective as of May 13, 1997. Under the

terms of the sublease. Schiphol was required to hire the Port Authority's own guard service to patrol the frontages and the interior of the IAB. (PBA Exh 9, at 340). As for controlling traffic on the frontage (PBA Exh 9, at 121), Schiphol was required to comply with and enforce the Rules and Regulations of the Port Authority at the IAB. (PBA Exh 9, at 116, PBA Brief, at 14). According to the PBA, the unrefuted testimony of Evangelista disclosed that the civilian security guards hired by Schiphol to perform the pedestrian and vehicular traffic control in question, are performing unit work previously performed by Port Authority Police Officers at the IAB. (PBA Brief, pp 15-16).

2 Evangelista observed civilian guards performing unit work at the IAB after the transfer of operations to Schiphol and presented photographic evidence of such observations. (See PBA Exh's 10-29, PBA Brief, at 16). He noted, inter alia, that the civilian guards wore blue uniforms, with badges, similar to Port Authority Police uniforms and observed said guards directing and controlling traffic in the frontage area of the IAB, as Police Officers had done prior to May 13, 1997. With regard to the interior of the building, particularly at Post 10 and Post 10 Alpha, Evangelista noted, inter alia, that the civilian guards patrolled the area in a similar manner that was performed by Post 10 Police Officers. In this connection, the PBA also noted Chief Romito and Inspector Morris provided corroboration that the civilian guards were performing unit work. For example, Chief Romito admitted that the security guards acted as a "general deterrent" to criminal activity just as Port Authority Police had before the guards. Inspector Moms testified to other activities performed by

guards that was formerly the work of the PBA at the IAB. (PBA Brief, at 17).

In short, the PBA asserts that the record compels the conclusion that the security guards working for Schiphol are performing what was formerly the work of the PBA at the IAB.

C The Control Retained by the Port Authority Since the Takeover by Schiphol and the Transfer of Unit Work

1 The PBA contends that since the takeover by Schiphol, in May 1997, the IAB has not changed its basic operations. As testified by Chuck Seliga, General manager of Kennedy Airport, the IAB served as a terminal for approximately 40 international carriers and as the only 24 hour a day federal inspection facility at the airport. To Seliga, the IAB continue to serve in the same manner. The PBA maintains that the only difference is that since May 13, 1997, the Port Authority does not "directly" run the IAB anymore. Such responsibility under the sublease is with Schiphol. (PBA Brief, at 18).

2 According to the PBA, under the terms of the lease, and the management functions retained by the Authority at the IAB after the takeover, it is "perfectly clear" that the Authority remains in "active control" of any activities it deemed important at the IAB. For example, the Authority has the right to control who the lessee rents to and to approve the form of the contract between Schiphol and the sublease of Schiphol. (See PBA Exh 9, at 73, PBA Brief, at 18). Also noted is that the Port Authority has the independent right to enforce the terms of either the lease [or] the sublease against the tenant. (PBA Exh 9, at 76-7). Still further, the Authority has the

absolute right to retake operation and control of the IAB at any time. (PBA Exh 9, at 171).

3 The Authority also retained control over other functions at the IAB, including the taxi dispatch service and provides, inter alia, a ground transportation desk inside the IAB for travelers. According to the PBA, these factors and the record as a whole indicate that the Port Authority retained any functions that it wanted to and that it merely transferred to Schiphol those functions that it did not want to manage directly. This enabled the Authority to retain effective control over traffic management and at the same time escape the relatively expensive method of using Police Officers. Under the sublease the Authority allowed Schiphol to provide traffic management but required Schiphol to use the Authority's private security guard service. Of greater significance, is that the Authority remains in active control over any of the activities it deemed important at the IAB. (PBA Brief, pp 18-20). The Port Authority still derives the same benefits vis-a-vis traffic flow and passenger protection, after the sublease as it had enjoyed previously only now those benefits flow from the work performed by Schiphol security guards rather than Port Authority Police. In the total circumstance of this case it must he deemed a transfer of unit work. (PBA Brief, at 27-28).

[4] The Union is entitled to a Cease and Desist Order and an Order to Return to the Status Quo Ante. As maintained by the PBA, as the record established that the Port Authority violated the Instruction by transferring unit work of its members to non-unit personnel, without negotiations, the Union is entitled to the aforenoted Orders under prior Panel decisions. (PBA Brief, at 43, citations omitted).

D *Fiberboard* plus Substantial Impact test

As the PBA contends that it established that the work in question has historically been unit work of its members at the IAB and that said work has been transferred to non-unit personnel, it turned next to demonstrate that the decision to transfer the disputed work was a mandatory subject for negotiations under the principles of the Panel's Fiberboard plus Substantial Impact test.

1 No basic alteration of the Port Authority's operation has occurred. In support of this conclusion, the PBA noted, that all the testimony at the hearing shows that the Port Authority has not made any changes allowing the Employer to eliminate bargaining unit work without prior negotiation. What has occurred is that the Port Authority made a unilateral decision to sublet the operation of the IAB to non-Port Authority personnel. The Port Authority still operates and manages JFK Airport, still provides an international terminal for 40 smaller airlines for the benefit of airport patrons, and, through its sublease requires that Schiphol provide the same services to airport patrons at the IAB that were previously provided by Police Officers and in the same manner. All that is changed is the employer of persons performing the traffic control and law enforcement patrol functions at the IAB and interior areas. The PBA noted that the Panel has held that what is done and how it is done remain essentially unchanged, no basic alteration of the Employer's operation has occurred. (PBA Brief, at 34, citation omitted).

2 No capital investment was involved, which if collectively bargained, would significantly abridge the Port Authority's freedom to manage its business. In this connection, the PBA noted that in fact, such

negotiations took place with two other unions, the TWU and the BTU and agreements were reached without any evidence that said negotiations abridged the Authority's freedom to conduct business. Also noted was the fact that the Authority retained many IAB functions (Taxi functions, Ground Transportation, Patron Aides, etc) tending to indicate that it could have similarly retained the functions of the Police Officers and still have been able to complete the sublease transaction. (PBA Brief, at 38-7). Finally noted was that the Schiphol deal developed over a period of several years tending to militate against the notion that the Authority needed flexibility or that time was of the essence to make said sublease. In these circumstances, the PBA contends that the finding must be in its favor on this element. (PBA Brief, at 37).

3 The decision of the Port Authority was clearly motivated by issues suitable for resolution within the collective bargaining framework. According to the PBA, it should be presumed that the kind of civilization or subcontracting involved herein, by its nature, will lead to cost savings for the Port Authority. In any event, the PBA maintains that the evidence established that the civilian guards employed by Schiphol at the IAB are less expensive than the continued use of Police Officers to perform the unit work in question. (PBA Brief, at 38). The PBA noted that the Panel has held that economic reasons, as here, the transferring of work to avoid payment of overtime, are motivations particularly suited to negotiated settlement. (*Id*, citation omitted). In this regard, it should be noted that the Port Authority witnesses admitted that the redeployment of the IAB Police Officers to other terminals at JFK Airport saved the Port Authority in overall overtime payments. (*Id.*).

4 The transfer of unit work from Port Authority Police Officers to private security guards at the IAB has had a substantial adverse impact on the members of the PBA. Here too, the PBA maintains that the record supports the finding that this final element of the Panel test has been satisfied. In dealing with this element, the PBA must satisfy its burden either quantitatively or qualitatively. (PBA Brief. at 39, citations omitted). The PBA contends that in the instant case, the record supports a finding of both quantitative and qualitative impact. (*Id.*). With regard to quantitative impact, the PBA pointed noted [sic] the testimony of Evangelista, with some corroboration from Inspector Romito. Thus, the PBA noted, inter alia, that Evangelista testified that Police Officers lost overtime opportunities and transfer opportunities at JFK Airport, a desirable assignment. As for the qualitative impact, this occurred when the core or prime functions of Police Officers were reassigned or transferred to non-unit personnel. (PBA Brief, at 41).

THE PORT AUTHORITY'S CONTENTIONS

Point I

The PBA has not shown that the work in question is unit work, or, assuming *arguendo*, that it has, the Port Authority did not transfer such unit work. In addressing the unit work allegation, the Authority noted certain testimony showing that the Guards have no authority to issue summonses, enforce vehicle, traffic or criminal laws, nor to effectuate any police action whatsoever. With regard to traffic regulations, the Guards merely direct drivers where to go and where to park a vehicle. On the other hand, the Police Officers possess these prime enforcement and arrest powers in conjunction with directing

and controlling pedestrian and vehicular traffic, as set forth in Job Specification 2600. The Authority noted that only one sentence of said Job Specification tangentially relates to what Guards do ("Directs movement of vehicular and pedestrian traffic at or in the vicinity of a facility"). In contrast, the predominant part of said Job Specification speaks of "controlling and expediting traffic movement in accordance with established patterns of traffic flow" and of "enforcing traffic regulations." (Jt Exh, 11, pp 295, 208, Respondent Brief at 11). Given such differences in the scope of functions performed by Police Officers as compared to Guards, the motorist instruction and the work performed by the latter group is not the traffic control and enforcement duties of Police Officers, nor is it the work Police Officers routinely do or have done. (*Id.*). As for the work performed by Guards in the interior of the IAB, said Guards were already In that facility prior to May 13, 1997 and JFKIAT merely continued their usage after the takeover. The Respondent maintains that as the same Guards were retained to perform the same functions they had been performing, for an entity not the Port Authority, the PBA's allegations that Guards performed unit work are spurious, disingenuous and patently without merit. (Respondent's Brief, at 12).

As noted above, the Authority refutes the PBA's contention that the work in question is unit work. However, the Authority maintains that if the finding is otherwise, it still could not have violated the Instruction because it has not transferred, and cannot transfer, such work. (*Id.*). According to the Authority, it has no control over the performance of such work because it is no longer the operator nor the manager of Terminal 4. In such circumstances, the Respondent asserts, it is both *de facto* and *de jure*

incapable of transferring said work. (Respondent Brief, at 13).

To support the conclusion that the Port Authority no longer had the requisite control and authority over the disputed work at Terminal 4 after the takeover by JFKIAT, the Respondent relies largely on the testimony of Manager Andrew Kreek, with corroboration from other management officials, including the testimony of Robert Kelly, Thomas Maher and Charles Seliga. As to conditions prior to May 13, 1997, Kreek testified to various services provided by the Authority for the 40 airlines and other retail tenants at the IAB, with the use of its (the Authority's) own employees or contract employees. These Services included security, and various forms of maintenance, such as, carpentry, plumbing electrical, painting and cleaning services. In all, of the approximately 200 Authority employees performing work in the IAB before the takeover by JFKIAT, the only Authority employees that remained in the building after the takeover "are Port Authority police officers for FAR response." (Tr 336-337). Following said takeover, aside from the FAR response, the aforenoted operational functions were taken over by JFKIAT with its own employees through the various building trades or other contractors. Or, as testified by Director of Aviation Robert Kelly, subsequent to the assumption of the operation by Schiphol "[w]e have removed all Port Authority staff from the building [IAB] and we currently have no responsibility." (Tr 44 7). According to management witnesses, the responsibility for these operational functions passed from the Authority to JFKIAT under the sublease. (Respondent Brief pp 13-23, 26).

The Respondent asserted that it had ceded all authority over the decision-making apparatus and the business, maintenance, service and aviation operations to JFKIAT at the IAB, on May 13, 1997. (Respondent Brief at 23). In this regard the Respondent points out that the record is devoid of any evidence tending to show that the Authority played any role in the decision to place guards in the frontages or to replace any of the Police officers inside or outside the IAB. According to the Respondent, the decision to use Guards in the interior of the building and in the frontage area belongs to the privately operated leaseholder (here, JFKIAT), as is done at the other eight terminals at the JFK Airport. What was formerly considered air terminal highway (the roadways adjacent to and annexed to Terminal 4), also became part of the privately operated leasehold and became colloquially known as "frontages." (Respondent Brief at 26-7). Here, the Respondent contends, that the PBA's effort to acquire such non-unit work that was generated by a privately operated leasehold, is an attempt to acquire new work. This attempt by the PBA is contrary to the provisions of the Instruction and must be rejected. (Respondent Brief, at 29). In short, the Respondent denies that it transferred unit work as alleged.

Point II

Even assuming arguendo, that the work in question is unit work and was transferred to non-unit personnel, the Port Authority still has no obligation to negotiate over the decision because the PBA has not satisfied its burden under, the principles of Panel's *Fiberboard* plus Substantial Impact test. To satisfy the burden depends on the answers to four questions. As to the first question, whether the Port

Authority altered its basic operations, the Authority contends that it has and that the PBA has failed to show otherwise. According to the Authority, the record demonstrated that it has not only "conclusively altered basic operations by not only no longer running and managing Terminal 4, but also by 'getting out of the business' of operating an international arrival facility at JFK Airport." (Respondent Brief, at 30). The Respondent maintains that in leasing Terminal 4 to JFKIAT, "it is not subcontracting, a function which it still controls and has given to another entity to perform, but rather the Port Authority has ceded and abrogated its operational and managerial functions to a new entity and has thus altered its basic operations." (Respondent Brief, at 30-31).

As to the second question, whether the Authority made a capital investment which, if subject to collective negotiations, would significantly abridge its freedom the to manage its business, here too, the Respondent contends that the PBA cannot refute that such was the case. In this connection, the Respondent noted that the record disclosed that the lease and reconstruction of Terminal 4 constitutes a $1.2 billion endeavor on the part of JFKIAT, with an additional contribution by the Port Authority of $82 million for roadway and parking lot renovations and reconstruction, as well as $15 million for contaminated soil removal. In addition, the Respondent invested $97 million in effectuating its decision to lease Terminal 4 in order to have some entity other that the Port authority spend $1.2 billion to construct a new Terminal. The Respondent contends that given the nature of the capital expenditure, the PBA failed to show how the Authority's decision to lease to a private sector entity to construct and operate Terminal 4, which, if subject to collective negotiations,

would not have abridged its freedom to do business. According to the [A]uthority, to permit the PBA to negotiate over the decision strikes at the very heart of its administrative authority. (Respondent Brief, at 32-33).

The Respondent also contends that the PBA failed to demonstrate that the factors that motivated the disputed decision, to utilize guards at [T]erminal 4 to instruct and direct motorists are suitable for resolution within the collective negotiations framework, another requirement under the Panel's test. According to the Authority, the decision to use Guards instead of Port Authority [Police Officers] was solely that of JFKIAT. In this connection, the record does not disclose that JFKIAT considered any factors related to Port Authority Police Officers. In any event, according to the Authority, any negotiations between the Port Authority and the PBA would not be binding on or material to JFKIAT. (Respondent Brief, at 32-33).

Finally, the Authority contends that PBA failed to show that the disputed decision that resulted in Guards doing the work in question had any substantial impact upon its members wages, hours and terms and conditions of employment. First, as testified by Chief Romito, no Police Officers from JFK Airport have been displaced as a result of the decision. (Tr 529). Nor have they been otherwise been negatively impacted as a result of privatization. (*Id.*). The Authority also rejects the notion that Police Officers have lost certain opportunities to transfer to JFK Airport that allegedly flowed from the decision to use Guards. According to the Authority, the "opportunity for transfer, and the temporal issues attendant thereto, is a function of staffing levels, which the

Panel has repeatedly held is a non-negotiable managerial prerogative. (Respondent Brief, at 33, Citation omitted). Moreover, the number of Police Officers at all Port [A]uthority Commands is below authorized strength. Thus, there was no impact on transfers as the JFK Airport Police Command did not have "extra" Police Officers available. In sum, the Respondent maintains that there is no credible evidence that any of the Police [O]fficers have been negatively impacted by the decision to utilize Guards. The Respondent contends that on this issue, and with regard to the case as a whole, the allegations are without merit.

DISCUSSION AND CONCLUSIONS

I Whether the Disputed Work was Unit work and, if so, was said Unit Work Transferred to Non-Unit Personnel

In essence, the PBA alleged that the Port Authority has unilaterally subcontracted or otherwise permitted unit work that was performed by Port Authority Police Officers both in the interior of the International Arrivals Building ("IAB") at JFK Airport and in the "frontage" area outside the IAB, to be transferred to non-unit personnel, to wit, civilian Security Guards. In doing so, without prior negotiations with the Union, the PBA maintains that the Authority thereby violated the work preservation provision contained in the Memorandum of Agreement between the parties (Jt Exh 11, at 63, see page 10 *supra*) and Section XI(A) (d) of the Instruction.

The Port Authority denies that the work in question is unit work or that transferred said work. According to the Authority, when it subleased the IAB (Terminal 4) to JFKIAT, effective May 13, 1997, the

Respondent got out of the business of managing and operating said terminal, the responsibilities were assumed by JFKIAT, with the Authority providing simple oversight, as it does for the other private unit terminal operator at JFK Airport. (Respondent Brief, at 5-6). As such, the Authority maintains that it no longer had control over the work in question and was therefore incapable of transferring said work. (Respondent Brief, at 12-13). Moreover, the Authority denies that it played any role in JFKIAT's decision, as the new terminal operator, to use civilian Guards rather than Port Authority Police Officers. (Respondent Reply Brief, at 1-2). Finally, the Respondent contends, assuming *arguendo*, that the Panel determines that a transfer of unit work occurred, the Port Authority was not under any obligation to negotiate over the decision to make such a transfer. (Respondent Brief, at 30). Initially, I will address whether the disputed work is unit work and whether such work was transferred, as alleged by the PBA. The Panel has long held that such inquires are threshold issues. *Port Authority Detectives Endowment Association and Port Authority*, 92 PAERP 25 (DEA), at 4 (1995).

(a) The Unit Work Issue

First, I find that the record clearly supports the allegation that the Guards hired by JFKIAT or, more particularly by Schiphol, are performing functions previously performed by Port Authority Police Officers both inside the IAB and in the frontage area to Terminal 4. The record disclosed that prior to the effective date of the Schiphol leasehold, the Port Authority Police Officers at the IAB historically performed, inter alia, foot and automobile patrol to direct the movement of vehicular and pedestrian traf-

fic in accordance with established patterns of traffic flow. In doing so, the Authority Police Officers could issue summonses and otherwise enforce traffic regulations. In addition, Authority Police Officers performed foot patrol inside and in the frontage area outside of the IAB in a variety of security functions to protect property and discourage unlawful conduct and caution or apprehend violators. With regard to security, the Authority also had a contract with FJC Security, a private sector security company, to provide, in large part, certain ancillary functions, such as, responding to door breaches and alarms.[8] The record also revealed that as of the effective date of the takeover by Schiphol, the civilian uniformed Guards performed essentially the same traffic direction and control functions at the IAB that Authority Police Officers had performed prior thereto. However, Guards could not issue summonses, enforce traffic regulations or criminal laws or make arrests.

It is largely because of the lack of enforcement powers on the part of Guards that Respondent disputes the notion that they "control traffic" or have performed unit work. According to Respondent, Guards merely instruct motorists where to park or where to move their vehicle. (Respondent Brief at 11). However, I find that "[c]ommon sense should tell the Port Authority that anyone with apparent authority

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[8] This work continued to be performed by JFK Security Guards after the instant takeover by Schiphol. The PBA is not seeking to acquire such work previously performed by civilian Guards inside Terminal 4. (Tr 129-133). However, the PBA objects to the Guard service "now performing the patrol functions formerly performed by Police Officer [inside the IAB] at the same locations formerly patrolled by PBA members." (PBA Reply Brief, at 3).

who stops traffic or otherwise requires motorists to follow instructions is performing traffic control work," as argued by counsel for the PBA, is more to the point. (PBA Reply Brief, at 2). Of overriding significance, is that substantial prime functions noted in Job Specification 2600 dealing with "movement of vehicular and pedestrian traffic" previously performed by Authority Police Officers at IAB posts on a daily basis, have been performed by Guards since Schiphol became the operator of Terminal 4. In large part, this finding is supported by the credited and uncontradicted testimony PBA Executive Director Don Evangelista. (See also PBA Exh's 10-29). In relevant part, Job Specification 2600 provides as follows:

TYPICAL DUTIES

2 Directs the movement of vehicular and pedestrian traffic at or in the vicinity of a facility. Controls and expedites traffic movement in accordance with established patterns of traffic flow and routing under normal conditions, but in unusual circumstances devise temporary traffic regulation methods. (Jt Exh 11, Document A, Specification 2600, at 206).

On the state of the record, there can be no doubt that Guards are performing functions noted above in Specification 2600 in a manner substantially similar to Port Authority Officers in the locations in question at Terminal 4. The PBA having so identified certain prime functions of Authority Police Officers that are now being carried out by Guards at Terminal 4, I find that the disputed work in issue is unit work, as alleged.

(b) The Disputed Transfer of Unit Work

Having found that the work in issue was unit work of Port Authority Police Officers, I turn now to consider whether said work was transferred to civilian Guards, as alleged by the PBA. This issue is more difficult to determine as there are significant factors tending to both support the transfer allegation, as well as militate against such finding. In addition, it appears that the Panel has not previously considered a sublease as the underlying document although here, there are similarities with subcontract agreements. Admittedly, the civilian Guards are not subcontractors of the Port Authority. (PBA Brief, at 27). The PBA noted that the Authority may not have transferred unit work directly to the Guards, but maintains that under the sublease, that "it (the Authority) certainly transferred it to Schiphol." (PBA Reply Brief, at 4). According to the Respondent it did not transfer the work and played no role in Schiphol's decision to hire Guards to perform the disputed unit work. The Authority maintains that Terminal 4 is no longer a Port Authority "facility" under the control of the Port Authority. Further, the Respondent contends, that akin to the other eight unit air terminals at JFK Airport, the Port Authority, under the sublease, is no longer responsible for the operation of Terminal 4, nor responsible for traffic or parking assistance in the frontage area of the building. (Respondent Reply Brief, at 1-2).

For reasons stated above, I have already found that in the locations in issue, Guards are performing "prime" unit duties previously performed by Authority Police Officers. The record also disclosed, as noted by the PBA, that the same services previously provided the airlines and other tenants by the Port

Authority, as the operator of the International Arrivals Building, have continued to be provided by Schiphol, as the operator of that facility, under the sublease. According to the PBA, the Port Authority has not gone out of the IAB business, it has merely interposed an intermediary corporation to run the IAB for them. (PBA Brief at 6). Compare *Transport Workers Union Local 1400 and the Port Authority*, 79 PAERP 31 (no violation where there was a curtailment of services). Still, for reasons noted below and on the basis of the total record. I am persuaded that the Authority did not transfer the work in issue and cannot be held accountable either contractually or under the Instruction for civilian Guards performing said work rather than Authority Police Officers.

The credited and uncontradicted testimony of Port Authority management officials support the Respondent's position that aside from retaining some general oversight of Terminal 4, lessor, the Authority no longer maintains and operates that facility in any cognizable sense. For example, after the IAB was turned over to the JFKIAT consortium to rebuild and operate Terminal 4, Schiphol, not the Authority, was the entity providing various carpentry, plumbing, electrical, painting, janitorial and other cleaning and maintenance services for the tenants of the facility. (Tr 328-332, 336-337, 340-341, 476-478). With regard to security inside the IAB, the civilian Guards who were employed by FJC Security under contract with the Authority before the consortium takeover, are now performing essentially the same services for Schiphol under a new contract with the latter entity. (Tr 128-130). The tenants pay rent to directly Schiphol for their space and for the various services provided by Schiphol, as the operator of the terminal. (Tr 496-497). It is Schiphol and no longer the Authority

that negotiates the various leases with the airlines and other retail tenants at Terminal 4. (Tr 478).

While the PBA does not dispute the foregoing operational responsibilities on the part of Schiphol, it still maintains that the Authority retained control over traffic management at the frontage of the IAB. The PBA asserted that the roadways in front of Terminal 4 constitute air terminal highway and, as such, only a Port Authority Police Officer may direct traffic thereon. (PBA Brief, at 7, Tr 176). According to the PBA, the Respondent demonstrated its continued control by requiring Schiphol to use the traffic management guard service chosen by the Port Authority, in accordance with the sublease. (PBA Brief at 21). The provision relied on by the PBA., in pertinent part, states as follows:

> The lessee understands that the Port Authority presently has a contract with a firm providing Frontage Management services for the purpose of monitoring and controlling the usage of passenger control terminal frontage roadways in the CTA . . . and the Lessee agrees, for so long as the same is made available by the Port Authority, to either accept from Port Authority or from the Port Authority contractor such service from time to time and to pay for the frontage management services . . . *or to provide substantially similar services itself.* (PBA Exh 9, at 340-341, underscoring added).

First, I do not find on the state of this record that the Authority insisted that Schiphol use Respondent's civilian Guard service on the IAB's frontage roadway. The sublease provision cited above provides Schiphol with an option to either use Respondent's Frontage Management Services "or to provide

substantially similar services itself" on the frontage roadway. (*Id.* at 341). As such, without more, I cannot draw an inference that the Authority "required" Schiphol to utilize FJC Security Guards. Schiphol hired the Guards in question, probably to benefit from their long experience of working at the IAB, as testified by Kreek. (Tr. 127-128). As for the PBA's contention that the frontage area leading to Terminal 4 constitutes Air Terminal Highway, I find that the weight of the credited testimony and the record otherwise tends to support the Authority's view that said frontage area is encompassed by the Schiphol leasehold. See also *Port Authority Police Benevolent Association, Inc., at al and Port Authority*, 94 PAERP 16, at 19 where the Panel noted, inter alia, that merely characterizing roadways as "air terminal highway" is a legal conclusion. There too, the Panel found the frontage roadways to be encompassed by leaseholds of private entities (the airlines).

Finally, the PBA asserts, that under the sublease, the Authority has the absolute right to retake operation and control of the IAB at any time. (PBA Brief, at 19). Here too, I find that neither the provision cited by the PBA (*Id.*, PBA Exh, at 171) nor the record otherwise support such conclusion. Rather, the provision in question concerns a "Security Plan," and, without more, cannot be read to permit the Authority the absolute right to resume operation and control of Terminal 4.[9]

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[9] While *Key Coal Co.*, 240 NLRB 1013 (1979) cited by the PBA (PBA Brief, at 29-30) has some appeal for treating a sublease as a subcontract in certain circumstances, it is noted, inter alia, that there, unlike the instant case, the Respondent had the absolute right to cancel the entire lease on day 10-day notice (at 1030). There, the General Counsel argued, inter alia, that the

On the state of the entire record I am unpersuaded that the PBA satisfied its burden of showing that the Authority possessed the requisite control to dictate that the work in issue be given to the Guards, as alleged. Having found that the record supports the Respondent's contention that with the takeover by JFKIAT of Terminal 4, the Authority went out of the business of managing and operating that facility and, as there was no showing that the Authority played a role in Schiphol's decision to hire Guards, I further find that the Authority did not transfer the disputed work. In situations, as here, where the Charging Party has failed to fully satisfy the threshold issues, the Panel has dismissed the Improper Practice without addressing the elements of its *Fiberboard* plus Substantial Impact test. *Port Authority Police Benevolent Association, Inc., et al and Port Authority*, 94 PAERP 16 at 22. Here however, given the nature of the underlying transaction, a sublease, and noting that the Panel has not squarely considered a sublease (unlike a typical subcontract) relative to an alleged transfer of unit work. I find it appropriate to do so.

II Whether the PBA has Satisfied all the Elements of the *Fiberboard* plus Substantial Impact test

Assuming *arguendo*, that the PBA accomplished its initial burden by showing that the Port Authority trans-

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Respondent remained essentially in business while divesting itself only of that part of the business which involve work done by members of the Union (at 1036). However, it is also noted that *Key Coal Co.* was decided before *First National Maintenance Corp v NLRB*, 420 U S 666 (1981), where the Court found a decision regarding as partial closure of a business, in the circumstances of that case, on balance, not to be amenable to collective bargaining and not be a mandatory subject of bargaining.

ferred unit work to non-unit personnel, as alleged, the PBA must then establish that the Authority's decision to do so was a mandatory subject of negotiations under the Panel's *Fiberboard* plus Substantial Impact test first enunciated in *The Lieutenant's Case*, 77 PAERP 6. I am mindful that not every decision to transfer unit work is a mandatory subject for negotiations. See, 92 PAERP 22 at 11; *The Lieutenant's Case*, *supra*. Whether a disputed decision is a subject for negotiations under the *Fiberboard* plus Substantial Impact test depends on the answers to four questions:

1 Did the Port Authority alter its basic operation?

2 Did the Port Authority make a capital investment which, if subject to collective negotiations, would significantly abridge the Port Authority's freedom to manage its business?

3 Are the issues which necessitate the decision to transfer the work suitable for resolution within the framework of collective negotiations? and,

4 Did the Port Authority's decision to transfer the unit work substantially impact employee's wages, hours, and terms and conditions of employment, either qualitatively or quantitatively? 89 PAERP 12, at 12, citing 89 PAERP 19, at 27-28.

With regard to the first question, I find that the record supports the Respondent's contention that the decision to privatize the IAB, converted the building, in large part, from a Port Authority facility to a Schiphol facility. As noted previously, with Schiphol taking over the myriad of managing and operational

responsibilities, the Port Authority's active presence virtually disappeared. Since the effective date of the takeover by the JFKIAT consortium, the Port Authority no longer negotiates and enters into lease arrangements with the airlines and other establishments renting space in the IAB. These functions are now carried out by Schiphol. The Authority's staff of over 200 employee at the IAB were eliminated although some of these employees were hired by Schiphol. However, as required under federal regulations, Authority Police Officers continue to have responsibilities at the FAR posts. (See, 5, *supra*). Schiphol hired its own staff and contract employees to manage and operate the terminal. In the circumstances of this case, noting particularly that the Port Authority now maintains little presence at the International Arrivals Building and has otherwise effectively removed it from the business of managing and operating the IAB, I find that the Authority has altered its basic operations, as contended by the Respondent.

I further find in favor of the Respondent with regard to the second part of the four part set forth in *The Lieutenant's Case*. The record disclosed that the Port Authority not only ceded operational management and day-to-day traffic control to Schiphol, but the decision to privatize also included a $1.2 billion dollar lease agreement with the JFK1AT consortium to rebuild and operate the IAB as Terminal 4. Included in the cost for the redevelopment of the IAB was $82 million for demolishing and rebuilding roadways to the terminal and for improving the public parking area in front of Terminal 4. The Authority had an additional $15 million obligation to JFKIAT to remove contaminated soil from the Terminal 4 leasehold. Given the nature and magni-

tude of the foregoing financial package, I am persuaded and find that the Port Authority's freedom to manage its business would have been significantly abridged, if said package was subject to collective negotiations with the Union.

As for the third element the PBA, here too, the PBA has not satisfied its burden of establishing that the factors that led to the disputed transfer were suitable for resolution within the framework of collective negotiations. There is no showing that the decision in issue was predicated in whole or in part on labor costs or other factors amenable to collective negotiations. Compare, *Fiberboard v NLRB*, 379 U S 203 (1964) (where no capital investment was contemplated and the decision to subcontract maintenance work was based on the employer's desire to reduce labor costs). While the record tends to indicate that an unspecified amount of overtime was lost by Authority Police Officers as a result of their redeployment to other locations within JFK Airport (Tr 119), the record falls far short of establishing a nexus between savings in overtime pay and the disputed decision. Nor do I view the fact that the Authority negotiated with the Transport Workers Union and Building Trades Union over the impact of its decision (Tr 343-345) as an indication that negotiations over the underlying "decision" were similarly suitable. (PBA Reply Brief, at 7). As the Panel has previously instructed "Although the Port Authority may not be obligated to negotiate about a decision prior to its implementation, *it is obligated to negotiate about the impact of such decisions.*" *Transport Workers Union and Port Authority*, 79 PAERP 31, at 35 (underscoring added).

In the instant case the PBA's focus is almost entirely on the Authority's failure to negotiate over its decision to sublease operational management of Terminal 4 to Schiphol. Clearly, the Authority was obligated to negotiate with the PBA over the impact on its affected members. The record however falls short of showing that in fact the Respondent has refused to negotiate over the "effects." In this regard the record disclosed that by letter dated June 24, 1997, the PBA "request[ed] immediate negotiations regarding the Impact of thus decision on our members." (PBA Exh 3). The Authority responded by letter dated July 2, 1997 indicating a willingness to discuss the matter with the Union "as part of overall negotiation." (PBA Exh 4). While it appears that the parties did not meet to discuss the impact, I cannot find, without more, that the Respondent refused to so negotiate. Since the PBA's principal focus was the Authority's unilateral "decision," it appears that the failure to meet vis-a-vis the "effects" may have been more a matter of miscommunication.

According to the Respondent, and the record tends to support, Terminal 4 was the anomaly while the Authority operated the facility. However, once operational control passed to JFKIAT, Terminal 4 became the mirror facility to the other eight unit air terminals where security and traffic control are also exclusive functions of the unit air terminal lessee/operators. (Authority Reply Brief, at 1). As noted previously, the Authority by so freeing itself from the business of operating Terminal 4, in essence, altered its basic operation. In addition, for reasons stated above, the decision to sublease to JFKIAT to construct and operate Terminal 4 included a significant capital investment which involved core managerial factors. Moreover, as there is no showing that

JFKIAT and the Authority are joint employers, any negotiations between the Authority and the PBA would not be binding on JFKIAT. On the basis of the foregoing and on the total state of this record, I find that the PBA has not demonstrated that the factors involving the disputed decision were suitable for resolution within the framework of collective negotiations.

As for the remaining part dealing with "substantial impact," I find that the PBA has satisfied its burden. The "substantial impact" requirement may be met either qualitatively or quantitatively. For the qualitative condition to be satisfied, the PBA has to show that the job responsibilities no longer being performed by its members at the locations in issue are not de [minimis] but rather involve "prime functions." Under the *quantitative* impact analysis, the PBA has to show adverse changes in wages hours and overtime opportunities of PBA members or whether any of them have been laid off, reassigned or have suffered any other adverse effect on their employment since the disputed work has been given to non-unit personnel. See 95, PAERP 17, at 16-17.

Insofar as meeting the *qualitative* condition, the record clearly established (as noted previously), that civilian Guards are performing "prime" unit duties set forth in Job Description 2600 on a regular basis, which work, was previously performed by Authority Police Officers at the same location. As for any *quantitative* adverse impact resulting from the unilateral decision to sublease, the record also disclosed that Authority Police Officers previously assigned to the International Arrival Building, were redeployed to other unit air terminals at the JFK Airport, with a concomitant loss of overtime opportunities. See 91

PAERP 31 (BTU), at 14. In this latter regard, Chief Romito noted that by redeploying Authority Police Officers, he was certain that their overtime was reduced. (Tr 119).

In short, I find that the PBA has shown both *qualitative* and *quantitative* adverse impact on its members as a result of the disputed unilateral decision to sublease to JFKIAT. Still, the PBA was required to establish each of the four elements set forth in the *Fiberboard* plus Substantial Impact test. 88 PAERP 12, at 4. As the PBA failed to satisfy its burden with regard to the first three elements, I find that the unilateral decision that led to the loss of unit work at Terminal 4 by Authority Police Officers was not a mandatory subject of negotiations.[10] Thus, the Authority did not violate either the work preservation provision in the MOA or the Instruction, as alleged. Accordingly, I shall recommend dismissal of the underlying charges.

CONCLUSIONS

On the basis of the entire record, I find that the PBA failed to satisfy its burden of establishing that the Port Authority hired, subcontracted, or permitted civilian Guards to perform unit work previously

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[10] It should be noted that I previously found that the PBA had also failed to establish the threshold issue as to whether the Port Authority transferred the unit work in issue. However, in the circumstances of this case, I find it unnecessary to determine whether the instant dispute involves acquisition of new work, as contended by the Respondent, particularly, as the record disclosed that Port Authority Police Officers performed said work at the IAB *before* Schiphol hired civilian Guards. Compare 94 PAERP 16, at 20-21 (where the disputed work had not been performed by Port Authority Police Officers at the location in question).

performed by Port Authority Police Officers at the same location, the International Arrivals Building ("IAB"). Under a sublease negotiated by the Port Authority and a consortium known as JFKIAT, the latter entity assumed operational control and management of the IAB. JFKIAT was solely responsible for hiring and assigning the disputed work to the civilian Guards in issue. It is not alleged nor does the record reveal that the Port Authority and JFKIAT are joint employers. For reasons previously stated, I find that the Port Authority's unilateral decision to sublease operational control and management of the IAB to JFKIAT was not a mandatory subject of negotiations. Thus, I find that the Port Authority did not violate the work preservation provision contained in the Memorandum of Agreement or Section XI(A)(d) of the Instruction, as alleged. Accordingly, I hereby issue the following recommended.

ORDER

Improper Practice Charge 97-28 (PBA) is dismissed in its entirety.

Dated August 24, 1999

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Irwin Kaplan
Hearing Officer

APPENDIX C

PORT AUTHORITY EMPLOYMENT RELATIONS PANEL

Case No. I P- 97-28

IN THE MATTER OF AN ALLEGED IMPROPER PRACTICE UNDER SECTION XI, PARAGRAPH A(d) OF THE PORT AUTHORITY LABOR RELATIONS INSTRUCTION

PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.,
Charging Party,

-and-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

FINAL DECISION AND ORDER

On July 28, 1997, the Port Authority Police Benevolent Association, Inc. ("PBA") filed Improper Practice Charge 97-28 against the Port Authority of New York and New Jersey ("Port Authority") alleging that the Port Authority had violated Section XI (A)(d) of the Port Authority Labor Relations Instruction ("Instruction"). The PBA claimed that the Port Authority had unlawfully transferred its unit work of directing and controlling traffic and performing security functions at sites at or near the International Arrivals Building ("IAB") to non-unit civilian personnel in violation of the Instruction.

The Port Authority filed its Answer on February 13, 1998 denying the allegations in the Charge and asserting that work being performed on behalf of an entity other than the Port Authority could not form the basis for an actionable claim of a transfer of unit work under the Instruction.

John C. Truesdale was initially appointed as Hearing Officer in this matter and he conducted hearings on October 1 and 20, 1998. As a result of Mr. Truesdale's appointment as a member of the National Labor Relations Board, and without objection from the parties, the matter was transferred by the Panel to Hearing Officer Irwin Kaplan together with the transcripts and exhibits from the first two hearing dates. Additional hearings were conducted on November 24, 1998, February 11 and 12, 1999 and March 24, 1999. At the hearings, the parties examined and cross-examined witnesses, introduced exhibits, and argued their positions. Both parties submitted post-hearing briefs and reply briefs to the Hearing Officer.

On August 24, 1999, the Hearing Officer issued his Report and Recommendations ("R&R") recommending that the Improper Practice Charge be dismissed in its entirety. The Hearing Officer concluded that the work in dispute was unit work as alleged, but that the Port Authority had not transferred the work because it did not possess legal control over the work at issue. The Hearing Officer also concluded that, even if the work at issue had been transferred, the PBA had not met the Panel's *Fibreboard* plus substantial impact test to establish that the transfer was a mandatory subject of negotiations. After the Hearing Officer issued his Report and Recommendations, but before the matter came before this Panel, the

PBA filed a Motion to Reopen the Hearing which the Panel referred to Hearing Officer Kaplan for decision. On November 18, 1999, the Hearing Officer issued an Order denying the Motion.

The PBA subsequently filed exceptions to the Hearing Officer's Report and Recommendations and also requested that it be permitted the opportunity to argue orally before the Panel. The Port Authority responded to the PBA's exceptions urging that the Charge be dismissed. The Panel granted the PBA's request and conducted oral argument in the matter on March 23, 2000. On July 7, 2000 the Panel issued its Tentative Decision and Order. The Panel rejected the Hearing Officer's recommendation that the Charge be dismissed and sustained the Charge concluding that the PBA had established a violation of the Instruction. The Port Authority filed lengthy comments to the Panel's Tentative Decision. Given the significant issues in this matter, the Panel both afforded the PBA the opportunity to respond to the Port Authority's comments, and the Port Authority the opportunity to reply to the PBA's response.

The Panel has reviewed the entire record, including the pleadings, the transcripts of the proceedings and the exhibits submitted therein, the parties' post-hearing briefs, the Hearing Officer's Report and Recommendations, the exceptions taken thereto, the transcript of oral argument, the Port Authority's comments to the Panel's Tentative Decision and Order and the subsequent submissions of both the PBA and the Port Authority, and concludes that the Port Authority violated the Instruction when it transferred PBA unit work to non-unit employees without negotiating with the PBA.

DISCUSSION

The facts in this matter' are largely undisputed and we adopt the Hearing Officer's findings of fact in this regard and supplement them from the record as noted herein. John F. Kennedy International Airport ("Kennedy Airport" or "JFKIA") is operated by the Port Authority pursuant to an "Agreement with respect to Municipal Air Terminals" dated April 17, 1947 ("the 1947 Agreement") which is a long-term lease between the Port Authority and the City of New York. "Finding of Fact 5; PBA Exhibit 7). The terms of this 1947 Agreement require the Port Authority to "provide police for patrolling, for guarding and for traffic control in the demised premises . . ." (PBA Exhibit 7, Section 11 at page 10). The 1947 Agreement also grants to the Port Authority:

> . . . full power and discretion to proceed with the financing, rehabilitation, expansion, improvement, development, operation and maintenance of the municipal air terminals, and to enter into such contracts, agreements, subleases or other arrangements with respect thereto as it may deem necessary and desirable, and all matters connected therewith, including but not limited to, all details of financing, construction, leasing, charges, rates, tolls, contracts, and operation shall be within the sole discretion of the Port Authority; . . . (PBA Exhibit 7, Section 37).

One of the facilities at the Airport is Terminal 4, known as the IAB. Beginning in 1994 the Port Authority embarked on a plan to upgrade Terminal 4. Ultimately a decision was made to solicit private investors to upgrade the IAB and, as a result, the Port Authority entered into a long term lease agree-

ment with JFK International Air Terminal LLC ("JFKIAT"), a partnership comprised of three entities, LCOR, Schiphol and Lehman Brothers. JFKIAT was to construct a new IAB with Lehman responsible for the financing, LCOR the construction, and Schiphol responsible for the actual operation of the terminal. (Finding of Fact 5). The lease agreement "PBA Exhibit 9) ("JFKIAT lease") is a comprehensive document consisting of approximately 379 pages along with numerous exhibits. Included within the JFKIAT lease agreement between the Port Authority and JFKIAT are detailed provisions setting forth the Port Authority's requirements concerning the passenger terminal frontage roadways (See PBA Exhibit 9, Section 16 at p. 121 et. seq.; Section 59 at p.337 et. seq.), the provision of security and guard service (Section 17 at p. 126 et. seq. and Section 20 at p.168) as well as requirements that JFKIAT obey the Airport Rules and Regulations of the Port Authority (PBA Exhibit 9, Section 13 at p. 116). The JFKIAT lease agreement also sets forth Port Authority remedies in case of default by the Lessee, including the right of the Port Authority to terminate the Lessee's rights upon sixty days notice. (PBA Exhibit 9, Section 25 at pp. 202 et. seq.).[1]

Prior to entering into the lease agreement with JFKIAT, the Port Authority had long operated the IAB. (Finding of Fact 7). Port Authority police officers, who are members of the bargaining unit repre-

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[1] We reject the Port Authority's contentions that the lease provisions cited are irrelevant to the work in dispute in this case. We note that Section 16 of the JFKIAT lease transfers the Port Authority's obligations to the City of New York with respect to patrolling, guarding and traffic control to the Lessee, JFKIAT.

sented by the PBA, handled a variety of security functions within the IAB and provided traffic direction and control in front of that terminal. "Findings of Fact 7 and 8). These police officers are covered by the terms of a collective negotiations agreement ("Memorandum of Agreement", "MOA", or "contract") between the PBA and Port Authority which includes a provision prohibiting the transfer of unit work. (Finding of Fact 14; Joint Exhibit 11).

On May 12, 1997, Port Authority notified the PBA that, effective May 13 1997, operation of the IAB was being turned over to Schiphol, and that in addition, frontage management of pedestrians and vehicles would become the responsibility of the terminal operator. (Finding of Fact 10; PBA Exhibit 2). As a result police officers represented by the PBA, who had previously maintained certain post within the IAB as well as police officers who had previously been stationed outside in frontage management of pedestrians and vehicles were removed, assigned elsewhere, and replaced by non-unit or civilian security personnel. (Findings of Fact 10 and 11). The instant Charge ensued.

Positions of the Parties

The PBA

The PBA contends that the Port Authority was required to negotiate with the PBA concerning the subcontracting of PBA unit work and that the Port Authority violated the Instruction when it did not do so but rather acted unilaterally. The PBA claims that the work at issue was clearly unit work and that it was transferred to non-unit personnel. The PBA also claims that the decision at issue meets the *Fibreboard* plus substantial impact test articulated

by the Panel and thus the decision was mandatorily negotiable. In this regard, the PBA asserts that there has been no alteration in the Port Authority's basic operation; that there was no capital investment involved which, if collectively negotiated, would significantly abridge the Port Authority's freedom to manage its business; that the decision at issue was clearly suitable for resolution within the collective negotiations framework; and that the decision to transfer the work had a substantial adverse impact, both qualitative and quantitative, on the membership of the PBA.

The Port Authority

The Port Authority claims the work in dispute is not unit work because it involves security functions rather than the prime functions of a police officer. The Port Authority also asserts that it did not transfer the work at issue because it was incapable of effectuating a transfer as it has no control or authority over the disputed work. The Port Authority contends that it ceded authority over the operation of the IAB to JFKIAT/Schiphol on May 13, 1997 and the decision as to who would perform the work in question were made by the leaseholder, rather than by the Port Authority. Therefore, the Port Authority argues, the PBA is seeking to acquire new work for which there is no negotiations obligation. The Port Authority also contends that there was no negotiations obligation under the Panel's *Fibreboard* plus substantial impact test because: the Port Authority altered its basic operation by getting out of the business of operating the IAB; the matter involves a large capital expenditure; the issues in dispute are not suitable for resolution through collective negotiations

framework; and there has been no substantial impact on the unit demonstrated.

DECISION

Pursuant to the Instruction, and particularly Section XI"A)"d), it is an improper practice for the Port Authority to refuse to negotiate "salaries, wages, hours, and other terms and conditions of employment . . . with the duly recognized representative of its employees." Preservation of unit work is a mandatorily negotiable term and condition of employment. See, e.g., 79 PAERP 14; 89 PAERP 19 and 24. A decision to transfer unit work may be a mandatory subject of negotiations and thus a refusal to negotiate such a transfer may be a violation of the instruction. See, e.g., 92 PAERP 15. Furthermore, the collectively negotiated Memorandum of Agreement between the Port Authority and the PBA reflects the parties' mutual agreement that there would be no transfer of PBA unit work being performed by or on behalf of the Port Authority without negotiations. (Joint Exhibit 11). This Memorandum of Agreement provides in pertinent part:

> 1. . . . during the term Agreement, there will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other work currently and heretofore performed by Police Officers shall be maintained . . . .
>
> 7. All existing Police Officer positions and/or assignments shall be maintained during the term of this memorandum of Agreement in accordance with the Police Position and/or Assignment List agreed upon between the partied so

> long as the work being performed continues to be performed by or **on behalf of** the Port Authority. (Joint Exhibit 11, Article XXX). (emphasis added).

Furthermore, the Port Authority and the PBA also expressly provided in the Memorandum of Agreement that all unit work disputes would be within the exclusive jurisdiction of this Panel and "subject to applicable standards to be determined by the Panel".[2] (Joint Exhibit 11, Article XXI).

Through case law over an extended period of time, the Panel has clearly enunciated the standards to be applied in determining whether a decision to transfer unit work is mandatorily negotiable and thus whether an unlawful transfer of unit work has occurred. See, e.g., 77 PAERP 6 (1978); 78 PAERP 14 (1990); 79 PAERP 32 (1981); 80 PAERP 1 (1981); 80 PAERP 2 and 4 (1982); 86 PAERP 2 (1988); 85 PAERP 13 and 32 (1991); 91 PAERP 31 (1994); 92 PAERP 25 (1995); 91 PAERP 6/9 (1996); 95 PAERP 17 (1998); 94 PAERP 3 (1999). The initial inquiry in a matter involving the alleged unlawful transfer of unit work is whether the work is, in fact, unit work, i.e., work which historically has been performed by the unit. 94 PAERP 16; 92 PAERP 25. The work need not

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[2] The language of the Memorandum of Agreement (collective negotiations agreement) is relevant despite the Port Authority's comments to the contrary. The fact that the Panel determines whether an obligation to negotiate exists (i.e. whether the transfer of unit work is a term and condition of employment) under the Instruction does not mean that the Panel ignores the pertinent language of the MOA or that the language has no meaning or effect. If the transfer of unit work is a term and condition of employment, the collectively negotiated contract language is relevant just as it would be if the parties had mutually negotiated away a term and condition of employment.

have been exclusively performed by the unit to constitute unit work. 95 PAERP 17; 90 PAERP 3. However, only the preservation of unit work is negotiable. In the present context, for example, if the work at issue was new work which the bargaining unit was seeking to acquire, there would be no violation of the Instruction. 94 PAERP 16; 89 PAERP 19. Further, there is no obligation to negotiate over the decision to eliminate, as opposed to transfer, unit work. 91 PAERP 6/9.

In this case, we concur with the Hearing Officer that the work in dispute is unit work. The record fully supports the Hearing Officer's findings that police officers employed by the Port Authority previously patrolled posts inside the IAB and also were stationed outside in the frontage roadways to control the movement of pedestrians and vehicles and that this same work is now being performed by non-unit security guards. The patrolling of assigned posts and the direction of the movement of vehicular and pedestrian traffic is delineated as a typical duty in the Port Authority job specification for police officer. (See Memorandum of Agreement, Document A, Joint Exhibit 11[3]). Simply because the security guards now

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[3] Document A, Specification No. 2600 for the classification Police Officer, provides in pertinent part:

TYPICAL DUTIES

1 Patrols assigned posts by foot or automobile, either in uniform or plainclothes. Observes the flow of vehicular traffic and takes appropriate actions to prevent violations of traffic regulations. Patrols assigned areas to protect property, to prevent unlawful conduct and incidents, and to caution or apprehend violators.

2 Directs the movement of vehicular and pedestrian traffic at or in the vicinity of a facility. Controls and

performing the work in question do not possess all of the authority of a police officer does not alter the fact that they are performing work that was previously performed by police officers as part of the their typical duties. Likewise the fact that police officers represented by the PBA still have law enforcement responsibilities at the IAB does not require a contrary result. All of the duties of the position do not have to be transferred in order for a transfer of unit work to occur.

Similarly this work is not new work simply because the IAB is being upgraded and thus its physical appearance altered. If the Port Authority had demolished the IAB and constructed a new IAB facility in its place, the Port Authority could not claim that the work to be performed in the reconstructed facility was "new work". The Port Authority's citation to the Panel's decision in 94 PAERP 16 is also inapplicable. In that case the Panel concluded that the work in question, that of directing and controlling vehicular and pedestrian traffic on the American Airlines' terminal frontage area at JFKIA was new work because Port Authority police officers had not historically performed the work in question on the American Airlines leasehold. Although the Panel's decision noted that Port Authority police had not regularly and routinely been assigned to perform such duties on the leasehold roadways in front of the airline terminal buildings, the Panel specifically

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expedites traffic movement in accordance with established patterns of traffic flow and routing under normal conditions, but in unusual circumstances devise temporary traffic regulation methods. (Memorandum of Agreement, Joint Exhibit 11, at pages 205-206.)

indicated, in contrast, that Port Authority police officers "have performed similar functions at the IAB." (Id. at 23).

Having found that the work at issue is the unit work of police officers, we now turn to the next threshold inquiry: was the work transferred. We conclude that it was. We are mindful of the Port Authority's position that, by virtue of its lease agreement with JFKIAT, it got out of the business of operating the IAB and that the work at issue is no longer being performed on the Port Authority's behalf. However, we do not find this to be so. We cannot ignore either the terms of the lease agreement between the Port Authority and JFKIAT or the terms of the 1947 lease between the City of New York and the Port Authority. The Port Authority is required to by virtue of its 1947 agreement with the City of New York to provide police for patrolling, for guarding, and for traffic control at the IAB.[4] The 1947 lease agreement describes the legal relationship between the City of New York and the Port Authority with respect to Municipal Air Terminals, including JFKIA. Contrary to the urgings of the Port Authority, we do not find Section 37 of that Agreement, which sets forth, in a "miscellaneous" provision, certain rights the Port Authority possesses under the terms of that agreement, negates the Port Authority's obligations under Section 11 and thus provide a legally justifiable basis for the Port Authority's action at issue. Nor do we find relevant the Port Authority's reliance

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[4] "The Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises. . . . The City will have no responsibility for maintaining . . . police personnel on the demised premises. . . . ["] PBA Exhibit 7, Section 11(c), at page 10.

on Section 21 of the 1947 lease agreement. The fact that the agreement between the City of New York and the Port Authority provides leeway to the Port Authority in conforming City ordinances and regulations related to the construction and maintenance of buildings and structures and in regard to health and fire protection relates, at best, to how the Port Authority carries out its responsibilities under the lease in these areas but does not eliminate the Port Authority's obligations under Section 11 of that agreement.

The Port Authority clearly and definitively required in the JFKIAT lease that the work of patrolling, guarding and traffic control be performed, see e.g., PBA Exhibit 9, Section 16 at p. 121-122, and we find that it continues to be performed on the Port Authority's behalf. We therefore find that an element of the lease between the Port Authority and JFKIAT was a subcontract of the work at issue. This is not a situation where the Port Authority has gotten out of the business of providing patrolling, guarding and traffic control. It remains obligated to provide these services and continues to do so. The Port Authority is fulfilling is obligation to provide these services through its arrangement with JFKIAT.

The Port Authority also argues that it has fulfilled its obligations under the 1947 Agreement since Port Authority police officers still carry out law enforcement functions at the IAB. However, the language of the 1947 Agreement is not limited to law enforcement functions; that Agreement requires the Port Authority to provide for patrolling, guarding, and traffic control. Thus the Panel does not find persuasive the Port Authority's arguments that since Section 11 of the 1947 Agreement refers to "*police* for patrolling . . ."

(emphasis added), the Port Authority's obligation under the 1947 Agreement are limited to strictly law enforcement functions. The fact that the Port Authority may meet its obligations under the 1947 Agreement to provide patrolling, guarding and traffic control by utilizing other than police officers at locations where police officers had not previously performed the work, does not lessen the Port Authority's obligation to provide these services. The Agreement makes clear that this is the Port Authority's responsibility and not that of the City of New York. Likewise we do not interpret the 1947 Agreement as permitting the Port Authority to abrogate its obligations in this regard by limiting its police officers to strictly law enforcement functions.

This is not analogous to the customs collar case, replied upon by the Port Authority. In that case, 91 PAERP 6/9, an informal oral agreement had existed between the Port Authority and the U.S. Customs Service whereby the Port Authority, acting as a subcontractor, processed certain arrests involving controlled substances within the U.S. Customs Service's jurisdiction in specific areas of JFK International Airport. As a result of a change in federal policy, the level of arrests increased and the Port Authority ultimately decided that it did not have sufficient personnel to allocate to this function and still maintain the activities it was expected, or required, to maintain. The Port Authority thus discontinued accepting arrests from U.S. Customs if the arrests pertained to a controlled substance. The Panel found in the case that the Port Authority had decided to get out of the business of processing arrests for violations of controlled substance laws on behalf on U.S. Customs at Kennedy Airport. As a result the Port Authority had no further interest in whether the

work continued to be performed or by whom. This Panel concluded that a curtailment of unit work had occurred and therefore the Port Authority had no obligation to negotiate the curtailment of unit work. See also 79 PAERP 31.

In the instant matter, however, the Port Authority has not, and could not, decide that the work of patrolling within the IAB, or directing vehicular and pedestrian traffic in the frontage roadways, could be eliminated. In fact, the Port Authority has specifically required that the work be performed and continues to exercise significant control over how and whom it is performed. The JFKIAT lease provisions in this regard are detailed and comprehensive. The work has not been eliminated but rather subcontracted by the Port Authority. Therefore, pursuant to Panel precedent, there has been a transfer of unit work.[5]

In 94 PAERP 16 this Panel dealt with the issue of whether there had been a transfer of unit work at the terminal frontage roadways adjacent to the American Airlines terminal at Kennedy Airport as a result of implementation of the Port Authority's Frontage Control Program. Our decision in that case is instructive here and consistent with our conclusions in the matter now before us. In finding that the work at issue there was not unit work but rather new work, we noted that while "Port Authority Police Officers

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[5] The Port Authority's contentions that it no longer controls the work in dispute ignores the fact that in any subcontracting case, the argument can always be advanced that by virtue of the subcontracting another legal entity now controls and directs the work in question. That reality does not, however, eliminate a lawful claim that the decision to transfer the work in dispute, which resulted in the subcontract, was a mandatory subject of negotiations.

have performed similar functions at the IAB, they have not routinely performed these functions on the individual airline leaseholds." *Id.* at 21. Thus the Port Authority's decision in that case to use a private guard service on American Airlines' leasehold, rather than police officers, was not a decision that was mandatorily negotiable under the Instruction because it involved the acquisition of new work and not the preservation of work previously performed by PBA unit personnel. In both 94 PAERP 16 and this case, the Port Authority was obligated to provide security and management of vehicular and pedestrian traffic on the Airport premises. The key distinction between 94 PAERP 16 and the present case is that in the instant case PBA unit members previously performed the work while in 94 PAERP 16 they did not.

Since we have determined in the case before us that the work in question is unit work and that there has been a transfer, we next apply the Panel's *Fibreboard* plus substantial impact test first articulated in 77 PAERP 6 (1978). The Port Authority was obligate to negotiate about the decision to transfer the work at issue if:

> The Port Authority has not altered its basic operation;
>
> The Port Authority has not made a capital investment which, if subject to collective negotiations, would significantly abridge the Authority's freedom to manage its business;
>
> The issues which motivated the decision were peculiarly suitable for resolution within the collective negotiations framework; and

> The decision substantially impacts upon the wages, hours, terms and conditions of employment, either quantitatively or qualitatively.

The Port Authority has not altered its basic operation as a result of its lease arrangement with JFKIAT. Patrolling of posts within the IAB as well as the control and direction of vehicular and pedestrian traffic in the frontage continue.[6] The work continues but has merely been reassigned to other than police officers. We reject the Port Authority's contention that it has altered its basic operation as a result of the JFKIAT lease because the Port Authority continues to be obligated under the 1947 Agreement to provide the services at issue here.

Likewise, the issue here did not involve a capital investment which would, if collectively negotiated, significantly abridge the Port Authority's freedom to manage its business. The Port Authority has made no capital investment with respect to how security functions are performed within the IAB on in the frontage areas. The financing arrangements which the Port Authority utilized to construct a new IAB are irrelevant to the unit work issues in dispute.[7]

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[6] Thus this case is factually distinguishable from the Panel's decision in 79 PAERP 31 relied upon by the Port Authority. In 79 PAERP 31, the Port Authority's operation of the Battery Park heliport was downgraded to a helistop as a result of the elimination of New York Airways' use of the facility and thus the Panel determined that what shall be done had changed. Here, the IAB continues to function ands the work at issue continues at its same level. Likewise, the Port Authority cannot claim that it has absolutely no involvement in the operation of the IAB. For example. It continues to provide law enforcement functions at the facility.

[7] This Decision does not require the Port Authority to negotiate with the PBA over its financial arrangements under the

We further conclude that the issues which motivated the decision were peculiarly suitable for resolution within the collective bargaining process. The JFKIAT lease which required that the disputed work be performed and set the standards for the performance was clearly premised on financial considerations which are peculiarly suitable for resolution within a collective negotiations framework. For example, the JFKIAT lease agreement suggested that certain work be performed by security guards employed by a Port Authority subcontractor. As noted previously, the JFKIAT lease required that the work in dispute continue. The work was previously performed by a PBA represented police officers; it now is being performed by security guards. What employees will be paid for the services they perform, and the impact of competing wage rates between different classifications of employees, is a matter that is most appropriate for resolution within the collective negotiations framework. We likewise do not agree with the Port Authority that negotiations over the decision to transfer to work in dispute would have had such a detrimental impact on the timing of the JFKIAT lease so as to eliminate the Port Authority's legal obligations in this regard. We find that Port Authority's argument to be speculative and unpersuasive.

JFKIAT lease. Likewise, this Decision does not prevent the Port Authority from deciding to have JFKIAT operate the IAB. Rather, the negotiations obligation is limited to the Port Authority's decision to transfer the work arising out of its obligations relating to the patrolling of posts within the IAB and the control and direction of vehicular and pedestrian traffic in the frontage area to non-unit employees. Negotiations in this regard would not significantly abridge the Port Authority's freedom to manage its business.

Finally, we conclude that the decision to have the work performed by non-unit security guards rather than by Port Authority police officers represented by the PBA had a substantial impact upon wages, hours and working conditions of the PBA bargaining unit. A significant number of positions that were formerly filled by police officers at the IAB have been lost as a result of the transfer of the work to security guards. This fact alone justifies a finding of substantial quantitative impact. We likewise conclude that the record has sufficiently established that the work transferred involved prime functions of a police officer's job responsibilities and thus the PBA has demonstrated qualitative substantial impact as well.

Conclusion

After carefully considering the entire record, the Panel concludes that the PBA has established a violation of the Instruction. We also conclude, in accordance with the parties' mutual delegation to this Panel of exclusive jurisdiction over unit work disputes, that the Port Authority has violated the provisions of the Memorandum Agreement prohibiting the transfer of unit work without negotiation. For the reasons set forth above, we find that the work of directing and controlling traffic and performing security functions at sites at and near the IAB is PBA unit work; that the Port Authority transferred that work by entering into a subcontract through a sublease with JFKIAT requiring that the work be performed on the Port Authority's behalf; and that the decision to transfer that work was a mandatory subject of negotiations.

Accordingly, the Panel concludes that the Port Authority violated Instruction Section XI (A)(d) and the Memorandum of Agreement when, without prior

negotiations, it transferred the work to JFKIAT. As a remedy, the Port Authority is directed to cease and desist from unilaterally transferring PBA unit work to non-unit personnel and return to the status quo ante by restoring the unit work at issue to the PBA bargaining unit.[8] The Port Authority is further directed to negotiate, upon request, with the PBA before unilaterally changing terms and conditions of employment.

ORDER

1. Improper Practice Charge 97-28 is sustained.
2. Pursuant to Instruction Section XI(I), the Panel hereby orders the Port Authority to:
   a. Cease and desist form unilaterally transferring PBA unit work to non-unit personnel.
   b. Take the following affirmative action which is necessary to effect the policies of the Instruction:
      (i) restore the statue quo ante by restoring the unit work at issue to the PBA bargaining unit;
      (ii) negotiate upon request with the PBA before unilaterally changing terms and conditions of employment; and

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[8] We do not agree with the Port Authority's contention that it is legally impossible to comply with a decision requiring the restoration of the status quo. The Port Authority cites no provision of the JFKIAT lease which would preclude such action. Restoration of the status quo ante is the standard remedy in matters where a violation of the obligation to negotiate a term and condition of employment is found, see, e.g., 90 PAERP 9, and we find no compelling reason to deviate from that standard here.

(iii) post at appropriate places of business copies of the attached Notice. Copies of said Notice, on forms provided by the Panel after being duly signed by representatives of the Port Authority, shall be posted by Port Authority at all places where notices to employees are customarily posted.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
Law Division: Essex County

Docket No.: ESX-L-1897-01

IN THE MATTER OF THE ALLEGED IMPROPER PRACTICE UNDER SECTION XI, PARAGRAPH A(d) OF THE PORT AUTHORITY LABOR RELATIONS INSTRUCTION; IP 97-28, FINAL DECISION AND ORDER OF THE PORT AUTHORITY EMPLOYMENT RELATIONS PANEL; PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Petitioner,

v.

PORT AUTHORITY EMPLOYMENT RELATIONS PANEL,
Respondent.

Argued: November 17, 2004
Decided: January 11, 2005

APPEARANCE:

Donald F. Burke, Esq., "Office of the New Jersey Solicitor of the Port Authority), Attorney for Petitioner

Robert E. Anderson, Esq. "General Counsel New Jersey Public Employment Relations Commission), Attorney for Respondent

Christine Carey Lilore, Esq., "Law Offices of Christine Carey Lilore), Attorney for Intervenr [*sic*]

I. Statement of Facts

This prerogative writ action was filed by the Port Authority of New York and New Jersey "Port Authority) pursuant to N.J.S.A. 32: 1-175. The Port Authority sought judicial review of a Final Decision and Order of the Port Authority Employment Relations Panel "Panel) rendered on January 11, 2001, which declared that the Port Authority had committed an improper practice by breaching the Port Authority Labor Relations Instructions "Instruction), as well as, the Memorandum of Agreement "Memorandum) between the Port Authority and the Port Authority Police Benevolent Association "PAPBA) when it entered into a Lease with J.P. Kennedy International Air Terminal L.L.C. "IATLLC) to build and operate a new International Arrivals Building "IAB).

The Port Authority operated JFK Airport pursuant to a 1947 Lease Agreement "1947 Lease) with New York City. Although New York City maintained ownership of the Airport, Port Authority, as lessee, was required to provide police for patrolling, guarding, and traffic control. For many years, JFK had operated in the same basic manner under the 1947 Lease in which Port Authority maintained a significant police presence of over 200 officers. However, on May 13, 1997, responsibility for the IAB was passed to IATLLC, which was a joint venture of three private companies, LCOR Incorporated, Schipol and Lehman Brothers. Lehman Brothers was to provide financing for the undertaking, Schipol would provide security and traffic control, and the IATLLC would construct a new terminal at a cost of $1.2 billion. Therefore, on May 13, 1997, the Port Authority removed all police officers, except those required by

FAA regulations, without any prior negotiations with the PAPBA.

On July 28, 1997, the PAPBA filed Improper Practice Charge 97-28, in which PAPBA alleged that the Port Authority had violated Section XI"A)"d) of the Instruction by unlawfully transferring the unit work of PAPBA officers who had directed and controlled traffic and performed security functions at site in or near the IAB to non-unit civilian personal. Pursuant to the Instruction, the Panel has the authority to adjudicate improper practices. The panel appointed a Hearing Officer who issued his Report and Recommendations on August 24, 1999, in which he proposed that the improper practice charge be dismissed. The PAPBA subsequently filed exceptions to that decision and oral argument between the parties was held before the Panel on March 23, 2000. On January 11, 2001, the Panel issued its final decision and concluded that the Authority had violated the Instruction when it transferred PAPBA unit work to non-unit employees without negotiating with the PAPBA. Thereafter, this prerogative writ action was filed seeking review of that decision. Oral argument was held on November 17, 2004 before this Court.

II. Arguments of the Parties

a. Argument of Port Authority

Port Authority claims that the Panel exceeded the proper scope of its expertise and construed the Leases in question, and thus, the Panel's [*sic*] acted arbitrarily, capriciously, and unreasonably. In addition, Petitioner asserts that deference should not be given to the decision because it involved issues of law and issues on which the agency had no expertise. Specifically, Port Authority claims that the Panel's

Final Decision and Order cannot be upheld if it: 1) offends the State or Federal Constitution; 2) violates express or legislative policy; 3) is not supported by substantial evidence; or, 4) is in clear error in reaching a conclusion that could not have been made on a showing of the relevant factors. As a result, Port Authority asserts that this Court may substitute its judgment for that of the Panel's on issues of law, which included the interpretation of the Leases in issue.

Petitioner contends that there are specific faults in the Panel's decision because the Panel: 1) wrongly construed the lease in question; 2) adopted the facts of the designated hearing officer, but supplied a different conclusion, which is not explained in the record; 3) incorrectly determined that there had been a transfer of work; 4) determined that there was a *Fireboard* [*sic*] plus impact; and 5) failed to acknowledge that the carrying out of policing is left to the discretion of petitioner.

Petitioner asserts that the Panel misinterpreted the 1947 Lease and the IATLLC sublease, and that such an interpretation was beyond its expertise. Specifically, Port Authority claims that Sections 11, 21, and 37 were misinterpreted. Section 11 of the 1947 Lease was heavily relied upon in the Panel's decision, and according to Petitioner it simply allocates the various responsibilities between the parties regarding the providing of municipal services, and does not impose on the Port Authority an obligation to provide those services in any particular manner.[1]

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[1] 11. *Garbage Removal, Snow removal. Police and Fire Protection*

a. The Port Authority shall collect garbage and refuse at each of the municipal air terminals and deposit the same

Petitioner further asserts that Sections 21 and 37 provide that the effectuation of the air terminals and their operation are at the sole discretion of the Port Authority, and thus, the 1947 Lease does not obligate the Port Authority to ensure the performance of any specific work.[2]

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at central deposit points within each of such air terminals as may be agreed upon between the parties. The City shall collect and remove the garbage and refuse from such central deposit points.

b. The City shall not be responsible for removal of snow and ice from the demised premises. The Port Authority shall not place such snow and ice upon any of the public streets or highways of the City.

c. The Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises, and equipment and personnel for aircraft crash and rescue work. The City will have no responsibility for maintaining fire or police personnel in the demised premises. The City agrees that its Police Department wi!! respond to calls from the Port Authority in the event of the commission of crime, rioting, disasters. and other emergencies in the demised premises, and that its Fire Department will respond to calls or put out structural fires and handle emergencies.

See, Agreement with Respect to Air Terminals Between the City of New York and the Port Authority, Section 11, Page 10.

[2] 21 *Policy In Regard To City Ordinances and Regulations*

In the rehabilitation, improvement, operation, and maintenance of the municipal air terminals. the Port Authority will as a matter of policy, conform to the enactments, ordinances, resolutions and regulations of the City and its various departments, boards and bureaus, in regard to the construction and maintenance of buildings and structures, and in regard to health and fire protection, which would be applicable if the Port Authority were a private corporation, to the extent that the Port Authority finds it practicable to do so without interfering with, impairing or affecting the efficiency and economy of its air terminal operations or its ability to operate the municipal air terminals

Petitioner claims that the only reasonable conclusion that can be drawn form [*sic*] the clear language of the 1947 Lease is that the City was relieved of providing those municipal services detailed in Section 11, and that Port Authority has full discretion to provide police. Since Port Authority police continue to enforce the law in the IAB Terminal 4 and throughout the airport, petitioner contends that it is complying with the provisions of the lease, and no transfer of unit work has occurred. In addition, Petitioner asserts that the lease does not require that a particular union provide such police, so the Panel distorted the language of Section 11"c).

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upon a self-supporting basis, or its obligations, duties and responsibility to the two states, its bondholders and the general public, but the decision of the Port Authority as to whether it is practicable to do so shall be controlling. To that end, the Port Authority shall submit copies of the plans and specifications for buildings and structures to the appropriate City officials, and shall consult with them with respect thereto, and shall receive their comments and suggestions thereon.

37 *Miscellaneous*

Except at herein otherwise provided, the Port Authority shall have full power and discretion to proceed with the financing, rehabilitation, expansion, improvement, development, operation, and maintenance of the municipal air terminals, and to enter into such contracts, agreements, subleases or other arrangements with respect thereto as it may deem necessary and desirable, and all matters connected therewith, including but not limited to, all detail of financing, construction leasing, charges, rates, tolls, contracts, and operation shall be within the sole discretion of the Port Authority in connection with any and all matters concerning the municipal air terminals shall be controlling, provided that all such things shall be done by the Port Authority in its own name on its own credit. See Agreement With Respect to Air Terminals Between the City of New York and the Port Authority, Sections 21 and 37, Page 14 and 24.

b. Argument of the Panel

In contrast, the Panel claims that its decision was neither arbitrary, capricious, or unreasonable, and it was within their area of expertise. Therefore, Respondent claims that it is entitled to deference. The Panel asserts that it acted in accordance with the provisions of the Instruction when determining that an Improper Practice occurred. It claims that Section XI"A)"d) of the Instruction makes it an improper practice to "refuse to negotiate salaries, wages, hours, and other terms and conditions of employment . . . with the duly recognized representatives of its employees." Since a decision to transfer unit work may be a term and condition of employment and a mandatory subject of negotiations, a refusal or failure to negotiate the transfer may be a violation of the Instruction. Furthermore, Respondent claims that the Memorandum includes a provision prohibiting the transfer of work without negotiation. Lastly, Respondent submitted that the Instruction's provisions obligating that Petitioner negotiate with employee representatives about decisions to reassign unit work does not significantly abridge Port Authority's freedom to manage the IAB.

c. Argument by PAPBA

The PAPBA intervened in support of the Panel's decision. PAPBA asserted that Port Authority's refusal to negotiate took away a critical aspect of the Agreement between the parties. PAPBA acknowledged that if Port Authority had removed itself from the business of operating the IAB, negotiation would not be required under the *Fireboard* [*sic*] plus standard. However, PAPBA submitted that Port Authority was not out of the business, but merely subcontracted its operations to IATLLC. As a sub-

contractor, PAPBA alleged that Port Authority and IATLLC must comply with the Instruction and the 1947 Lease.

III. Standard of Review

When reviewing the action of an administrative agency, this Court is restricted to three enquiries: 1) whether the action violates the enabling act's express or implied legislative policies; 2) whether there is substantial evidence to support the findings upon which the agency based its application of legislative policies; and 3) whether in applying those policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. *Public Service Electric and Gas Co. v. New Jersey Dept. of Environmental Protection*, 101 N.J. 95 (1985).

This analysis is also known as the arbitrary, unreasonable, or capricious standard. *Marr v. ABM Carpet Service, Inc.*, 286 N J. Super. 500 "Law Div. 1995). This standard of review limits the reviewing court's role because the administrative agency's determination is presumed valid when that agency is acting within its capacity. *Impey v. Shrewsbury Borough Board of Education*, 142 N.J. 388 (1995). As a result, New Jersey courts have historically granted great deference to the decisions of administrative agencies. *Campbell v. Department of Civil Service*, 39 N.J. 556, 562 (1963).

Since the Port Authority is not under the sole jurisdiction of New York or New Jersey, the Instruction was created as mechanism to synthesize the duties typically reserved for New Jersey's Public Employment Commission and New York's Public Employment Relations Board. As a result, the Panel

is an administrative agency created to review employment issues under the Instruction. Therefore, a decision of the Panel will be upheld if it is supported by substantial evidence in the record, and is neither arbitrary, capricious, nor unreasonable.

IV. Review of the Record

This Court reviewed the record submitted from below in light of petitioner's objections to the conclusions of the Panel. Those objections were that the Panel: 1) wrongly construed the lease in question; 2) adopted the facts of the designated hearing officer, but supplied a different conclusion, which is not explained in the record; 3) incorrectly determined that there had been a transfer of work; 4) determined that there was a *Fireboard* [*sic*] plus impact; and 5) failed to acknowledge that the carrying out of policing is left to the discretion of petitioner.

This Court is satisfied that the Final Order and Decision of the Panel is supported by substantial credible evidence in the record and is neither arbitrary, capricious, or unreasonable substantially for the reasons given by the Panel in its Final Decision and Order of January 11, 2001. The Panel's conclusion is based upon a sound interpretation of the Leases and supporting documents, which are contained in the record before this Court. Since this is not a situation where Port Authority has gotten out of the business of providing patrolling, guarding, and traffic control, Port Authority remains obligated to provide these services and continues to do so through its sublease.

a. The Panel's Construction of the 1947 Lease and the IATLLC Lease

The record demonstrates that the Panel's Final Decision and Order properly relied on the 1947 Lease. That lease states that the Port Authority is to "provide police for patrolling, for guarding, and for traffic control in the demised premises . . . ." This requirement is expressly set forth in Section 11 of the 1947 Lease. Despite Port Authority's contentions, Sections 21 and 37 do not trump Section 11. Port Authority may enter into such contracts, agreements, subleases, or other arrangements it deems necessary and desirable to fulfill its obligations under the 1947 Lease. Accordingly, the IATLLC Lease represents a valid sublease agreement. However, the IATLLC Lease provides for the patrolling, guarding, and performing of traffic control at the IAB terminal and it is clear that the work would be performed on the Port Authority's behalf. It is an uncontested fact that when the operation of IAB was turned over to IATLLC in May 1997, the PAPBA officers who had been previously stationed outside for the management of pedestrians and vehicles were removed, assigned elsewhere, and replaced by non-unit civilian security personnel. The Memorandum includes a provision prohibiting the transfer of unit work without negotiations.[3]

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[3] Pursuant to Article XXX of the Memorandum, the Port Authority agreed that:

> 1. . . . . during the term of this Agreement, there will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other unit work currently and heretofore performed by Police Officers shall be maintained . . .

In addition, the Instruction has a similar provision preventing transfer without negotiation because Section XI(A)(d) makes it an improper practice to "refuse to negotiate salaries, wages, hours, and other terms and conditions of employment . . . with the duly recognized representatives of its employees."

b The Panel's Review of the Hearing Officer's Decision

The Hearing Officer made a recommendation, not a decision. This Court finds that the Panel was not obligated to adhere to that recommendation in any way.

c. The Panel's Determination that There Had Been a Transfer of Unit Work.

Since the work has not been eliminated but rather subcontracted by the Port Authority, this Court agrees with the Panel that there has been a transfer of unit work. The record demonstrates that security at the IAB was, in effect, being subcontracted to a third party, which resulted in a transfer of unit work in violation of the terms of the Memorandum. Simply because the security guards now performing the work in question do not possess all of the authority of a police officer does not alter the fact that they are performing work that was previously performed by police officers as part of their typical duties.

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7. All existing Police Officer positions and/or assignments shall be maintained during the term of the Memorandum of Agreement in accordance with the Pole Position and/or Assignment List agreed between the parties so long as the work being performed continues to be performed by *or behalf of the Port Authority*. (emphasis added).

In reaching this conclusion the Panel declared that 94 PAERP 16 was instructive on the issue. In that case the Panel held that the Port Authority's decision in [*sic*] to use private guard services on American Airlines leasehold rather than police officers was not negotiable because it involved new work and not the preservation of work previously performed by PBA unit personnel. The Panel properly distinguished that case from the instant case because it is uncontested that PAPBA unit members previously performed the work, which was transferred to non-unit civilians.

d. The Panel's Determination That There Was a Fireboard [*sic*] Plus Impact

The Panel has developed and consistently applied a framework for analyzing the transfer of unit work allegations, which has been in place and accepted by all parties for over 25 years. This Court finds no reasons exist to adjust the Panel's application of this standard practice. First, the Panel looked to see whether the work at issue is unit work and whether there has been a transfer of that work to non-unit employees. If that question is answered in the affirmative, the Panel then applies the *Fireboard* [*sic*] plus Substantial Impact Test to determine if the transfer of unit work at issue is a mandatory subject of negotiations, in which Port Authority was required to negotiate that decision. Under this test, the Port Authority is not required to negotiate a transfer of unit work if:

i. The Port Authority has not altered its basic operation;

ii. The Port Authority has not made a capital improvement which, if subject to collective

negotiations, would significantly abridge the Port Authority's freedom to manage its business;

iii. The issues which motivated the decision were particularly suitable for resolution within the collective negotiations framework; and,

iv. The decision substantially impacts upon wages, hours, terms, and conditions of employment, either quantitatively or qualitatively, of the unit employees.

According to the Memorandum and Instruction, unit work may not be transferred without negotiations. As stated above, the Panel properly found a transfer did occur, and then analyzed that transfer under the *Fireboard* [*sic*] plus Substantial Impact Test. Since the Port Authority has not altered its basic operations, the transfer of unit work was a mandatory subject of negotiations. This Court finds that although there was a change in the operations at IAB, there was not a change in the services provided at IAB, and hence, the Port Authority had not altered its basic operations. In addition, the record establishes that no capital investment was made with respect to how security functions were performed.

Since there is an issue of what employees will be paid for the services they perform, and the impact of competing wage rates between different classifications of employees, this Court is satisfied that the issues in dispute were particularly suitable for resolution within a collective negotiation framework. Also, the transfer of unit work had a substantial impact on wages, hours, and terms and conditions of employment of the PAPBA officers. This determi-

nation by the Panel was not arbitrary, capricious, or unreasonable in any way.

e. The Panel's Analysis of the Petitioner's Discretion in Carrying Out of Police Functions

The Panel did not deny that the Port Authority had discretion in the manner in which it decided to carry out its police functions, but it did determine that Port Authority was obligated to negotiate the transfer of unit work. This conclusion was based on the terms of the Instruction and Memorandum between the parties, and the fact that those agreements reflect the parties' mutual agreement that there would be no transfer of PBA unit work being performed by or on behalf of the Port Authority without negotiations. If the work was new work, then negotiations would not be required and Port Authority's discretion over this new work would not be interfered with. However, this clearly was a transfer of existing work, so the Panel properly concluded that the Port Authority's discretion was subject to mandatory negotiations. Therefore, Petitioner's claim that the Panel did not afford due discretion was properly rejected.

V. Conclusion

The record clearly indicates that the Panel did not act arbitrarily, capriciously, or unreasonably in reaching its determination that the Port Authority committed an Improper Practice. That decision was within the sound discretion of the Panel and is entitled to administrative deference. A review of the record establishes that the Panel relied on the Hearing Officer's review of the facts, the 1947 Lease, the Memorandum, and the Instruction when making its improper practice determination.

The arguments advanced by Port Authority are the same arguments that were submitted to the Panel. The Panel considered those arguments, but rejected them for reasons set forth in the record. This Court finds that the Panel's decision does not offend the State or Federal Constitutions or an express or implied legislative policy. Furthermore, the decision is supported by substantial evidence in the record and no clear error in the conclusion has been demonstrated. The analysis applied by the Panel is within its expertise for which deference must be given. Therefore, it is the holding of this Court that the Final Order and Decision in Improper Practice 97-28 was not arbitrary, capricious, or unreasonable. Quite to the contrary, the decision of the Panel, their findings of facts, and conclusions of law are well supported in the record and reflect the opinion of this Court.

Affirmed.

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
Appellate Division

Docket No. A-3134-04T2

THE MATTER OF THE ALLEGED IMPROPER PRACTICE UNDER SECTION XI, PARAGRAPH A(d) OF THE PORT AUTHORITY LABOR RELATIONS INSTRUCTION; IP 97-28, FINAL DECISION AND ORDER OF THE PORT AUTHORITY EMPLOYMENT RELATIONS PANEL; PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Petitioner-Appellant,

v.

PORT AUTHORITY EMPLOYMENT RELATIONS PANEL,
Respondent-Respondent.

Argued October 18, 2006 – Decided December 8, 2006

Before Judges Cuff, Fuentes and Baxter

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1897-01.

Donald F. Burke, argued the cause for appellant, Port Authority of New York and New Jersey.

Robert E. Anderson, General Counsel, New Jersey Public Employment Relations Commission, argued the cause for respondent, Port Authority Employment Relations Panel.

Christine Carey Lilore argued the cause for respondent, Port Authority Police Benevolent Association.

PER CURIAM

Petitioner Port Authority of New York and New Jersey (Port Authority) appeals from a judgment upholding the Final Decision and Order of a Panel of the Port Authority Employment Relations Board (Panel), in which the Port Authority was found to have unlawfully transferred the unit work of Port Authority police officers to non-unit employees without negotiating with the Port Authority Police Benevolent Association 'PBA).

The Port Authority appealed the Panel's decision in the Law Division, by filing an action in lieu of prerogative writs. The trial court rejected the Port Authority's challenge to the Panel's decision, adopting the reasoning and conclusion reached by the Panel.

The Port Authority now appeals, raising the following two issues: (1) the trial court, as well as the Panel, ignored a specific provision in the Port Authority Labor Relations Instruction which grants the Port Authority the discretion to make decisions regarding its "mission and management", including its "organization, staffing, planning, operating and financial policies;" and (2) the Panel's analysis of the leases in question, forming the basis for its conclusion that the Port Authority improperly transferred unit work, was flawed and, thus, the trial court erred in deferring to the Panel's conclusion.

After carefully reviewing the record, and mindful of our limited scope of review, we reject these arguments and affirm. We are satisfied that the Panel's decision was supported by substantial credible evidence in the record, and was not otherwise arbitrary, capricious or unreasonable. We affirm substantially

for the reasons expressed by the Panel, as reflected in its memorandum of opinion dated January 11, 2001.

We need not recite the salient facts that formed the basis of this dispute, because they are succinctly stated in the Panel's opinion. Instead, we incorporate them by reference here. Our standard of review in these types of appeals is limited. *In re Taylor*, 158 *N.J.* 644, 656 (1999). We will not disturb the ultimate determination of an administrative agency unless it was arbitrary, capricious, or unreasonable; unsupported by the evidence; or violative of the legislative policies expressed or implied in the act governing the agency. *Ibid.* (citing *Brady v. Bd. Of Review*, 152 *N.J.* 197, 210-11 (1997)); *Campbell v. Dep't of Civil Serv.*, 39 *N.J.* 556, 562 (1963).

In going about this task, we are not permitted to substitute our own views of the evidence from the findings made by the administrative body. If we find sufficient credible evidence in the record to support the agency's conclusions, we are bound to uphold those findings, even if we believe that we would have reached a different result. *Sager v. O.A. Peterson Constr., Co.*, 182 *N.J.* 156, 164 '2004).

Applying these standards to the issues raises here, we are satisfied that the Panel's findings and conclusions of law reached therefrom are unassailable. Under the so-called "*Fibreboard* plus substantial impact test," the Port Authority was legally required to negotiate with the PBA prior to assigning non-unit employees to perform work traditionally done by unit employees alone. *City of Jersey City v. Jersey City Police Officers Benevolent Ass'n*, 154 *N.J.* 555, 575 '1998); see *Fibreboard Paper Prods. Corp. v. NLRB*, 379 *U.S.* 203, 85 *S. Ct.* 398, 13 *L. Ed.* 2d 233 '1964).

Affirmed.

APPENDIX F

Pertinent Constitutional and Statutory Provisions

The Compact Clause of the United States Constitution, Art. I, Sec. 10, cl. 3, provides:

> "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State."

N.J.S.A. § 32:1-175 states as follows:

32:1-175. Employment relations panel; orders; enforcement and review

Orders of the employment relations panel established by resolution of the Port Authority of New York and New Jersey adopted September 29, 1976 made pursuant to the provisions of such resolution shall be (a) enforceable either in a special proceeding upon petition of such panel by the Supreme Court in the State of New York or upon application by the panel for an appropriate enforcement order by the Appellate Division of the Superior Court in the State of New Jersey and (b) reviewable either under article seventy-eight of the civil practice law and rules in the State of New York or by action in lieu of prerogative writ in the State of New Jersey, upon petition filed by an aggrieved party, including the Port Authority of New York and New Jersey acting in its capacity as employer, within 30 days after service by registered or certified mail of a copy of such order upon such party. In any such proceeding to enforce or review an order of such panel, the court shall, notwithstanding sections five and nine of chapter three hundred one of the laws of New York, nineteen hundred fifty and P.L.1951, c. 204 (C. 32:1-157 et seq.), have power to grant such temporary relief or restraining order as it

deems just and proper, and to make and enter a judgment or decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of such panel.

McKinney Unconsolidated Laws § 7141 states as follows:

> Enforcement and review of Employment Relations Panel orders; temporary relief

Orders of the employment relations panel established by resolution of the port authority of New York and New Jersey adopted September twenty-ninth, nineteen hundred and seventy-six made pursuant to the provisions of such resolution shall be (i) enforceable either in a special proceeding upon petition to such panel by the supreme court in the state of New York or upon application by the panel for an appropriate enforcement order by the appellate division of the superior court of the state of New Jersey, and (ii) reviewable either under article seventy-eight of the civil practice law and rules in the state of New York or by action in lieu of prerogative writ in the state of New Jersey, upon petition filed by an aggrieved party, including the port authority of New York and New Jersey acting in its capacity as employer, within thirty days after service by registered or certified mail of a copy of such order upon such party. In any such proceeding to enforce or review an order of such panel, the court shall, notwithstanding sections five and nine of chapter three hundred one of the laws of New York, nineteen hundred fifty, and chapter two hundred four of the laws of New Jersey, nineteen hundred fifty-one, have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a judgment or decree enforcing, modifying and

enforcing as so modified, or setting aside in whole or in part the order of such panel.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 97-1651 (WHW)

THE PORT AUTHORITY POLICE SERGEANTS BENEVOLENT ASSOCIATION, THE PORT AUTHORITY POLICE DETECTIVES ENDOWMENT ASSOCIATION, INC., THE PORT AUTHORITY POLICE LIEUTENANTS BENEVOLENT ASSOCIATION, AND THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.,

Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

OPINION

JOEL A. PISANO, *United States Magistrate Judge*.

Before the court is the plaintiffs' motion to remand this action to state court. Defendant Port Authority of New York and New Jersey (the "Port Authority") has filed opposition to the motion and the matter is decided without oral argument pursuant to Federal Rule of Civil Procedure 78. For the following reasons, plaintiffs' motion to remand is denied.

Factual Background

The Port Authority is an entity created by the states of New Jersey and New York to administer transportation facilities near their common border on the Atlantic Ocean and the Hudson River. The Port Authority was created by a compact between the

states (the "Compact"), approved by Congress. *See* U.S. Constitution Art 1, § 10, cl. 3. The states adopted the Compact into their statues, and included provisions that neither state could change the Compact without the concurrence of the other. *See* N.J.S.A. § 32:1-8; McKinney's N.Y. Unconsol. Laws § 6408. The states granted the Port Authority the power to hire employees, N.J.S.A. § 32:1-15, and Port Authority in turn promulgated the Port Authority Labor Relations Instruction (the "PALRI") governing the labor relations between it and its employees. The PALRI recognizes the right of Port Authority employees to form unions and designate those unions as collective bargaining representatives.

Among the Port Authority's employees are the Port Authority Police. Various Port Authority police officers are organized into and represented by the Port Authority Benevolent Association, Inc. (the "PBA"), the Port Authority Detectives Endowment Association, Inc. (the "DEA"), the Port Authority Sergeants Benevolent Association, Inc. (the "SBA") and the Lieutenants Benevolent Association, Inc. (the "LBA" and together with the PBA, DEA, and SBA, the "Unions"). The various Unions have been without contracts for periods of ranging between one and a half and four and a half years. To resolve the contract impasses, plaintiffs requested that the Port Authority consent to binding arbitration of the type available to state workers in New York and New Jersey. *See* N.J.S.A. § 34:13A-5.3; N.Y. Civil Svc. Law § 209 (4). Neither the Compact nor the PALRI compels the Port Authority to engage in binding arbitration with the Union or any collective bargaining representative.

PROCEDURAL BACKGROUND

Plaintiff's filed a three-count complaint on March 20, 1997, in the Chancery Division of the Superior Court, Bergen County, seeking an injunction compelling the Port Authority to submit to binding arbitration with the Unions (Docket No. C-82-97). On April 1, 1997, the case was removed to the District Court upon defendant's petition asserting that the case arose from the Compact, which has the character of a Federal law, such that the District Court had jurisdiction pursuant to 28 U.S.C. § 1441. Plaintiffs subsequently moved for remand to the Superior Court.

DISCUSSION

I. Motion to Remand Standard

Because the District of New Jersey treats motions to remand as non-dispositive, the Court will decide this motion by final order. See *Campbell v. I.B.M.*, 912 F. Supp. 116, 118 (D.N.J. 1996).

Sections 1441(a) and (b) of Title 28 set forth the general removal provisions. Section 1441(a) provides, in pertinent part:

> Excerpt as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court . . . for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). The district court's "original jurisdiction" referred to in § 1441(a) can be found when the claim arises under federal law. *Powers v. South Central United Food & Commercial Workers*

Unions and Employers Health and Welfare Trust, 719 F.2d 760, 763 (5th Cir. 1983).

Section 1441(b) states that:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b). Pursuant to § 1441(b), citizenship of the parties is not a factor when the district court has federal question jurisdiction.

When the case is removed pursuant to §§ 1441(a) and 1441(b), all served defendants must join in the removal. 28 U.S.C. § 1446. *Nelson v. United Artist Theater Circuit, Inc.*, 835 F. Supp. 844, 845 (E.D. Pa 1993).

In ruling on the motion to remand, the court must evaluate the complaint that was current when the case was removed. *Angus v. Shiley Inc.*, 989 F.2d 142, 145 (3d Cir. 1993). A plaintiff may not destroy federal jurisdiction following removal simply by amending the complaint. *Id.*

II. JURISDICTION OVER THE COMPACT

The Compact extensively describes the powers and limitations of the Port Authority. *See* N.J.S.A. §§ 32:1-1 to 32:2-36. If further duties are imposed upon the Port Authority, as they have been throughout its existence, they must be imposed by

"action of the legislature of one state concurred in by the legislature of the other." N.J.S.A. § 32:1-8; McKinney's N.Y. Unconsol. Laws § 6408. The term "concurred in" is not specifically defined in the Compact or the subsequent legislation. The New Jersey Supreme Court has defined "concurrent action" by a state to include the subsequent adoption by one compacting state of legislation substantially similar to that of the other compacting state. *See International Union of Operating Engineers, Local 68 v. Delaware River and Bay Auth.*, 147 N.J. 433, 446 (1997) ("The amendment of N.J.S.A. 34:13A-1 to -29, constitutes concurrent legislative action.") (hereinafter "*DRBA*"). For a court hearing this matter to determine whether the legislatures of the states had concurred in imposing the obligation to participate in binding arbitration, it would have to determine whether "concurred in" had the same meaning as "concurrent action." That court would, in short, have to construe the Compact.

The Courts of this circuit have previously determined that they have the authority to construct interstate compacts and have termed the interaction of state law and interstate compact a question of statutory construction. *See Pievsky v. Ridge*, 921 F.Supp. 1335, 1337 (M.D. Pa.), *aff'd* 98 F.3d 730 (3d Cir. 1996) (holding that Pennsylvania law did not bind the Pennsylvania-New Jersey Delaware River Port Authority); *Waterfront Com'n v. Construction & Marine Co.*, 928 F.Supp. 1388, 1394 (D.N.J.) (Walls, J.), *aff'd mem.* 103 F 3d 115 (3d Cir. 1996). Moreover, the New Jersey Supreme Court has acknowledged that whatever jurisdiction New Jersey has over compact entities is concurrent with federal jurisdiction. *See DRBA*, 147 N.J. at 440 ("The next question is whether compacts deemed federal laws

are subject to the jurisdiction *only* of the federal courts or to the *concurrent* jurisdiction of state courts.") (emphasis supplied).

The Port Authority is entirely a creature of the Compact. It has no inherent sovereignty and cannot be understood apart from the Compact, which created it. As such, any matter dealing with the obligations of the Port Authority must, of necessity, involve the court interpreting the Compact. The interpretation of interstate compacts is a question of federal law and properly comes within the jurisdiction of the federal courts.

III. MOTION TO REMAND

Plaintiffs argue that the court hearing the case need only apply state law, because the plaintiff's claim are alleged entirely in terms of state law. Under the well-pleaded complaint doctrine, a state law complaint must remain in state court unless it alleges a federal law claim on its face. *See Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 353 (3d Cir.), *cert. denied* 116 S. Ct 564 (1995). An exception exists, however, when the complaint is artfully crafted in state-law language but nevertheless pleads a federal cause of action. *See United Jersey Banks v. Parell*, 783 F.2d 360, 367-68 (3rd Cir.) (explaining the artful pleading doctrine and citing *Federated Department Stored, Inc. V. Moitie*, 452 U.S. 394 (1981)), *cert. denied*, 476 U.S. 1170 (1986). A federal cause of action , unless it arises in diversity, arises from "the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The Compact, which governs all activities of the Port Authority, is a law of the United States. *See Pievsky v. Ridge*, 98 F.3d 730, 733 (3d Cir. 1997).

In that the court hearing the case must construe the Compact, which is a law of the United States, concurrent federal jurisdiction exists. Plaintiffs thus may not claim that state jurisdiction is exclusive. Accordingly, since the case presents an issue of federal law and the defendant has removed the case to be heard in federal court, the case will remain here. The motion to remand in denied.

IV. ABSTENTION

In the alternative, the plaintiffs argue that the Court, even if it has jurisdiction, should abstain pursuant to *Colorado River Water Conservation District v. United Sates*, 424 U.S. 800. In their brief, plaintiff's characterize *Colorado River* as calling for abstention when there is an ongoing state action that may moot the federal action or when complicated state law issues of public policy are present and contend that both factors are present in the instant action. Plaintiff's, however, cannot get past the first hurdle: the state action must be ongoing. *See id.* at 817. When the matter was removed to this court the state action ceased to exist. Because there is no state action to defer to, the Court will not defer and thus declines plaintiffs' invitation to abstain.

V. MOTION TO DISMISS

In its opposition papers, the defendant has filed an informal application to dismiss the matter pursuant to Federal Rule of Civil Procedure 12(b)(6). The defendant refers to this application as a "cross-motion." No conference pursuant to Federal Rules of Civil Procedure 16 and 26(f) has been held in this case, and as a result the initial scheduling order, which sets forth the permissible return dates for dispositive motions, has not yet issued. As a result,

defendant's application to dismiss is premature. This application is denied without prejudice.

CONCLUSION

For the reasons set forth above, plaintiffs' motion to remand is denied. Defendant's informal application is also denied.

Joel A. Pisano
United States Magistrate Judge

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(2)

No. 08-274

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

PORT AUTHORITY POLICE
BENEVOLENT ASSOCIATION, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1257(a) is a basis for jurisdiction when the federal question raised was not pressed or passed upon in the state court.

2. Whether, the New Jersey Supreme Court correctly held that, pursuant to the Instruction governing labor relations at The Port Authority of New York and New Jersey, the redeployment of Port Authority police officers occasioned by a 1997 lease of the international terminal at JFK Airport was exempt from any collective bargaining requirement.

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IN THE

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PORT AUTHORITY POLICE
BENEVOLENT ASSOCIATION, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Port Authority of New York and New Jersey respectfully requests that the Court deny the petition for a writ of certiorari of the Port Authority Police Benevolent Association, Inc. to review the decision and judgment of the Supreme Court of New Jersey in *In the Matter of the Alleged Improper Practice under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction; IP 97-28, Final Decision and Order of the Port Authority Employment Relations Panel; Port Authority of New York and New Jersey v. Port Authority Employment Relations Panel and Port Authority Police Benevolent Association,*

Inc., Docket No. A-6 September Term. This case is reported at *In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction*, 194 N.J. 314, 944 A.2d 611, (2008) Petition for Certiorari Filed, 77 USLW 3107 (August 28, 2008) (No. 08-274).

JURISDICTION

Respondent respectfully submits that Petitioner's reliance on 28 U.S.C. § 1257(a) for jurisdiction is misplaced because the federal question asserted was not pressed or passed upon in the state court and petitioner is precluded from pressing it now. Further, the petition fails to meet the Rule 14.1(g)(1) requirement that a certiorari petition seeking review of a state court judgment must specify from the record of proceedings when and how the federal questions were raised and the way in which the state courts passed on those questions. Respondent respectfully submits that in light of the above, 28 U.S.C. § 1257(a) does not provide jurisdiction in this matter.

STATEMENT OF THE CASE

Petitioner's contention that the New Jersey Supreme Court was required but failed to apply the deferential standard of review reflected by federal law in its review of the decision of the Port Authority Labor Relations Panel and that application of federal law would have changed the outcome fails for two reasons. First, the federal question was not pressed or passed upon in the state court and petitioner is precluded from pressing it now. Second, the New Jersey Supreme Court, applied a deferential standard of review consistent with New York and federal law.

A review of the unique nature of The Port Authority of New York and New Jersey (Port Authority) and the framework for resolving labor disputes is necessary to appreciate the issues in dispute. The Port Authority was created on April 30, 1921 by a Compact between the States of New York and New Jersey, which was approved by the Sixty-Seventh Congress of the United States. The Compact established the Port Authority as a joint and common agency of the States of New York and New Jersey. *N.J.S.A.* 32:1-1; *N.Y. Unconsol. Laws*, Section 6401 (McKinney 1979). The Port Authority consists of 12 commissioners, six from each state. The Commissioners are appointed by their respective state governors and the governor of each state has the power to veto the actions of the commissioners appointed from his state. *N.J.S.A.* 32:1-17; *N.Y. Unconsol. Laws*, Section 7151 *et seq.* (McKinney 1979).

The Compact grants broad discretion to The Port Authority Board of Commissioners with regard to appointing officers and employees and in fixing and determining their qualifications and duties. The Compact states:

> The Port Authority . . . may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

N.J.S.A 32:1-15 and *N.Y. Unconsol. Laws*, Section 6408 (McKinney 1979).

As a Compact Clause entity, the Port Authority is not subject to unilateral state legislation of either New Jersey or New York. State legislation must be passed concurrently by both states to be directly ap-

plicable to the Port Authority. *See N.J.S.A.* 32:1-8 and *N.Y. Unconsol. Laws* Section 6408 (McKinney 1979). Accordingly, neither the New Jersey Public Employment Relations Commission (PERC) nor the New York Public Employment Relations Board (PERB) has jurisdiction over the Port Authority and neither the *New Jersey Public Employer-Employee Relations Act, N.J.S.A.* 34:13A-1 *et seq.* nor the *New York Pubic Employee's Fair Employment Act, N.Y. Civil Service Law*, § 200 *et seq.* (McKinney 1983) is applicable to the Port Authority. *See Delaware River and Bay Auth. v. New Jersey Pub. Employment Relations Comm'n.*, 112 N.J. Super. 160 (App. Div. 1970), *aff'd*, 58 N.J. 388 (1971).

In light of the inapplicability of single state legislation to the Port Authority, the Port Authority's Board of Commissioners promulgated a Labor Relations Instruction in order to establish a framework for negotiations between the Port Authority and its employees. The action of the Board of Commissioners in promulgating the Instruction and the principles set forth therein were reviewed and approved by the Governors of both New York and New Jersey pursuant to *N.J.S.A.* 32:2-9 and *N.Y. Unconsol.* Section 7153 (McKinney 1979). Through the Instruction, the Port Authority Board of Commissioners set forth the guiding principles to govern the Port Authority's labor relations and appointed a panel, known as the Port Authority Employment Relations Panel ("Panel"), to resolve certain disputes between the Port Authority and its employee organizations. The Panel consists of three members. In recognition of the agency's bi-state nature, one member of the Panel is appointed subject to the written recommendation of the Chairman of the New Jersey Public Employment Relations Commission. Another

member is appointed subject to the written recommendation of the Chairman of the New York Public Employment Relations Board. The third member, the Chairman of the Panel, is appointed subject to the written joint recommendation of the Chairman of the New Jersey Public Employment Relations Commission and the Chairman of the New York Public Employment Relations Board. The Legislatures of New York and New Jersey sanctioned the Labor Relations Instruction and the principles and standards set forth therein when they enacted concurrent legislation supplementing the Compact permitting the enforcement and/or review of Orders of the Panel pursuant to *N.J.S.A.* 32:1-175 and *N.Y. Unconsol. Laws*, Section 7141 (McKinney Supp. 1991).

The guiding principles established by the Port Authority Board of Commissioners and set forth in the Port Authority Labor Relations Instruction that were interpreted and applied by the New Jersey Supreme Court provides:

> In all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation, Panel members and other persons appointed by the Panel shall be guided but not bound by administrative and judicial interpretations of the public sector labor law of these states of New York and New Jersey. Notwithstanding the foregoing, the mission and management responsibilities of the Authority, including its organization, staffing, planning, operating and financial policies, shall not be subject to negotiation with employee organizations.

(Port Authority Labor Relations Instruction, Section III, D (emphasis added)).

Despite the clear and unambiguous language used in the Port Authority Labor Relations Instruction, the principle that the "mission and management responsibilities of the Authority, including its organization, staffing, planning, operating and financial policies, shall not be subject to negotiation with employee organizations" became the center of the dispute between the Port Authority and the Port Authority Police Benevolent Association when the Port Authority decided to privatize the international terminal at JFK Airport.

In 1994, the Port Authority began a process to determine whether to modernize or replace the international terminal at JFK Airport. Among the proposals considered was the solicitation of private investors to construct, operate and maintain the terminal. The following year, the Port Authority solicited and received four proposals from the private sector. In 1997, it accepted a proposal from JFK International Air Terminal LLC (JFKIAT), a limited liability company comprised of three separate business interests: the developer responsible for the construction of the new terminal, the operator responsible for the operation of the completed terminal, and the financing source responsible for the financing of the new terminal. JFKIAT's proposal provided for the construction of a new international terminal at a cost of $1.2 billion. The Port Authority and JFKIAT then entered into an comprehensive lease that outlined each party's obligations.

Approximately one month before entering into the lease with JFKIAT, the Port Authority met with the PBA, explained the lease proposal for the interna-

tional terminal at JFK Airport, and assured the PBA that "no Port Authority Police Officers would be displaced from JFK Airport nor suffer any negative impact as a result of" the lease. Those assurances were followed by a Port Authority memorandum dated May 12, 1997 that advised that, effective at noon the following day, JFKIAT would "assume responsibility for the [international terminal, and that] police services commensurate with that provided other unit terminals at JFK will be maintained[, and that f]rontage management of pedestrians and vehicles will become the responsibility of [JFKIAT]."

The lease became effective on May 13, 1997 and, from that date forward, JFKIAT assumed all security functions at JFK Airport's international terminal. Although those events required the redeployment of the Port Authority police officers formerly assigned to the international terminal, no police officer lost his or her job; the sole record evidence of any possible impact on the police officers was the unsubstantiated opinion of the chief of the Port Authority police department that, "by redeploying [Port] Authority Police Officers, he was 'certain' that their overtime was reduced."

Six weeks later, the PBA protested. In a letter dated June 24, 1997 and addressed to the Port Authority's director of human resources, the PBA set forth its view that "the Port Authority Labor Relations Instruction and the Memorandum of Agreement between the Port Authority and [the PBA] forbid this unilateral action by the Port Authority." It also asserted that, "without prejudice to [its] right to file an improper practice or grievance[, the] PBA requests immediate negotiations regarding the impact of this decision upon our members[,]" explaining that "[t]he PBA will take appropriate action thereafter." On

July 2, 1997, the Port Authority responded, rejecting any claim that the Port Authority had acted improperly, but expressing a willingness to discuss the PBA's concerns "as part of overall negotiations." The PBA did not respond to that invitation. Instead, on July 28, 1997, the PBA filed its improper practice charge against the Port Authority.

The PBA's improper practice charge specifically alleged:

> [T]he Port Authority has either hired, subcontracted, permitted or suffered non-unit personnel to perform PBA unit work. Civilian personnel are directing and controlling traffic and are performing security functions at sites at or near the [international terminal,] which functions have traditionally and historically been performed by the PBA. This action was taken by the employer without any prior negotiation with the PBA in violation of the Labor Relations Instruction and the Memorandum of Agreement.

Notwithstanding the clear language, the Port Authority Employment Relations Panel rejected the conclusions of a Hearing Officer that it had assigned to hear the matter and, contrary to the Hearing Officer's recommendation, ruled in favor of the PBA on its improper practice charge. The Panel concluded "the Port Authority violated the Instruction when it transferred PBA unit work to non-unit employees without negotiating with the PBA".

In its analysis, the Supreme Court of New Jersey fully reviewed the "special legal status" of the Port Authority and the guiding principles for labor relations established by the Port Authority Board of Commissioners and appropriately found that the

Panel's conclusion ignored the limiting language of the Port Authority Labor Relation Instruction and vacated the Panel's decision. It noted:

> In 1976, the Port Authority adopted its Labor Relations Instruction. Among other things, the Instruction (1) safeguarded the right to collectively bargain via employee organizations for Port Authority non-managerial employees; (2) created the Panel to administer disputes between the Port Authority and its employee organizations; (3) established procedures for the processing of those disputes; and (4) provided for judicial review of any decisions of the Panel. The grant of authority to the Panel was subject to a significant exemption: Section III(D) of the Instruction specifically provides that **"[n]otwithstanding the foregoing, the mission and management responsibilities of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations."**

In RE alleged Improper Practice, supra at 320, 944 A.2d 6. (Emphasis added).

As to Petitioner's contention that the New Jersey Supreme Court failed to correctly apply a deferential standard of review, a cursory review of the decision demonstrates that the Court applied a highly deferential standard of review. In this regard, the Court stated:

> We underscored that "[a]n administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it

lacks fair support in the record." *Id.* at 27-28, 926 A.2d 350 (citing *Campbell v. Dep't of Civil Serv.*, 39 N.J. 556, 562, 189 A.2d 712 (1963)). We cautioned that "[t]hree channels of inquiry inform the appellate review function:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [*Id.* at 28, 926 A.2d 350 (quoting *Mazza v. Bd. of Trs.*, 143 N.J. 22, 25, 667 A.2d 1052 (1995)).]

Thus, "[w]hen an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." Ibid. (citations omitted). Judicial respect for proper administrative agency action runs deep: "Deference controls even if the court would have reached a different result in the first instance." Ibid. (citing *In re Taylor*, 158 N.J. 644, 657, 731 A.2d 35 (1999)).

Id. 331-332, 944 A.2d 622.

Also contrary to Petitioner's assertion, the New Jersey Supreme Court never "rejected" the New York standard of review. The opposite is true.[1] The Court

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[1] In this regard, the Port Authority Labor Instruction provides:

expressly noted that both New York and New Jersey apply a deferential standard of review. Requiring an agency to respect the limitations placed on its authority is entirely consistent with New York and federal standards of review. For instance, in *Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v Williams*, 72 N.Y.2d 137, 531 N.Y.S.2d 791, 527 N.E.2d 274, the New York Court of Appeals held that the courts should use their own competence to decide issues of law raised by an agency's compliance with the provisions of the State Administrative Procedure Act in promulgating regulations, and should defer to the agency's special expertise only where such expertise is relevant. *See also*, *Hamburg v McBarnette*, 83 N.Y.2d 726, 613 N.Y.S.2d 355, 635 N.E.2d 1225 (1994), holding that the court would not defer to the State Department of Health's interpretation of its regulations regarding reimbursement for local public health services where the department essentially repeated the statutory language.

As for federal law, the *Administrative Procedure Act* (APA), 5 U.S.C. § 706 (2000), similarly provides that a court will set aside an agency action if it finds that the action exceeds the authority granted, or violates limitations imposed, by a federal statute. *See* APA § 706(2)(C) "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (C) in excess of

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> In all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation, Panel members and other persons appointed by the Panel shall be guided but not bound by administrative and judicial interpretations of the public sector labor law of the states of New York and New Jersey.

Instruction, Section III, Paragraph D.

statutory jurisdiction, authority, or limitations, or short of statutory right."

Notwithstanding the application of a deferential standard of review, the New Jersey Supreme Court concluded:

> The application of this standard of review informs our conclusion that the Panel's determination that "the Port Authority violated the Instruction when it transferred PBA unit work to non-unit employees without negotiating with the PBA" is not entitled to any special deference and should be rejected. This is because the Panel neither followed the law nor relied on any particularized expertise in reaching its conclusion. In specific, the same organic document that created the Panel – the Instruction – also limits its jurisdiction. In clear and explicit terms, the Instruction states that "the mission and management responsibilities of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations." (Emphasis supplied). The lease arrangement in respect of the international terminal delegated to the lessee all of the Port Authority's obligations under its lease with the City of New York and, hence, relieved the Port Authority from the day-to-day operational responsibility for that terminal. For that reason, the Port Authority's plan to lease to a private party the whole of the international terminal directly implicated "its organization, staffing, planning, operating and financial policies," a plan that, prior to its implementation, was presented to and approved by the Port Authority's Board and, by the submission and

> approval of its minutes, by the Governors of both New Jersey and New York. Furthermore, the Panel's decision hinged solely and exclusively on its interpretation of the lease between the Port Authority and JFKIAT, a matter that does not reside within the Panel's unique area of competence. When gauged in the aggregate, then, the Panel's determination must be rejected.

Id. at 332-333, 944 A.2d 622-623. The analysis of the New Jersey Supreme Court was consistent with New York and federal law and the Petition should be denied.

REASONS FOR DENYING THE PETITION

A. Petitioner's Reliance on 28 U.S.C. §1257(a) as a Basis For Jurisdiction Is Misplaced Because Any Federal Question Raised Asserted Here Was Not Pressed or Passed Upon By the State Court

The petition asks the Court to determine whether the Port Authority Labor Relations Instruction, an Instruction adopted by the Port Authority is subject to review under federal law and, if so, whether the Supreme Court of New Jersey erred by applying New Jersey authority instead of federal law when reviewing the Panel decision.

Respondent submits that this does not raise a federal question, but if it did, Rule 14.1(g)(i) requires a certiorari petition seeking review of a state court judgment to specify "the stage of the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." The Rule further requires the certiorari

petition to set forth "pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.* The petition fails to comply with this rule.

Further, the New Jersey Supreme Court's opinion is silent on the application of the federal standard petitioners contend should have been applied. "[W]hen the highest state court fails or refuses to pass expressly upon a federal question, the party evoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation. *See Campbell v. Louisiana,* 523 U.S. 392, 403, 523 U.S. 392, 118 S.Ct. 1419 (1998).

In *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (*per curiam*), this Court made it clear that:

> With "very rare exceptions," *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

In the instant case, the federal issue raised in the certiorari petition was not pressed or passed upon before the New Jersey Supreme Court and the petition must, therefore, be denied.

B. The Supreme Court of New Jersey Applied a Deferential Standard of Review and Correctly Held That The Port Authority's Decision To Sublease Operational Control and Management of the International Terminal at John F. Kennedy International Airport Directly Implicated the Port Authority's Management and Operating Policies And Therefore, Pursuant to the Principles Established By The Port Authority Labor Relations Instruction, Collective Bargaining Was Not Required

The contention that the petition for certiorari should be granted because the New Jersey Supreme Court was required, but failed, to apply the federal standard of review in its review of the decision of the Port Authority Labor Relations Panel and that application of federal law would have changed the outcome fails. The New Jersey Supreme Court, in fact, applied a highly deferential standard of review.

In reviewing the decision of the Port Authority Labor Relations Panel, the Supreme Court of New Jersey succinctly stated the issue presented as follows:

> [W]hether the May 1997 lease of the international terminal at John F. Kennedy International Airport (JFK Airport)-and the resulting redeployment, without any job losses or terminations, of Port Authority police officers to other portions of the JFK Airport-gave rise to an obligation on the

> part of the Port Authority to collectively bargain that redeployment with the PBA.

In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, 194 N.J. 314, 317, 944 A.2d 611, 613 (2008).

The Court recognized the "special legal status" of the Port Authority and the guiding principles for labor relations established by the Port Authority Board of Commissioners, stating:

> In 1976, the Port Authority adopted its Labor Relations Instruction. Among other things, the Instruction (1) safeguarded the right to collectively bargain via employee organizations for Port Authority non-managerial employees; (2) created the Panel to administer disputes between the Port Authority and its employee organizations; (3) established procedures for the processing of those disputes; and (4) provided for judicial review of any decisions of the Panel. The grant of authority to the Panel was subject to a significant exemption: Section III(D) of the Instruction specifically provides that **"[n]otwithstanding the foregoing, the mission and management responsibilities of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations."** (Emphasis supplied.)

Id. at 319-320, 944 A.2d 615.

Contrary to the Petitioner's assertion, the New Jersey Supreme Court in its analysis of the Panel's decision applied a highly deferential standard of review applicable to administrative agencies stating:

> We underscored that "[a]n administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." *Id.* at 27-28, 926 A.2d 350 (citing *Campbell v. Dep't of Civil Serv.*, 39 N.J. 556, 562, 189 A.2d 712 (1963)). We cautioned that "[t]hree channels of inquiry inform the appellate review function:
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> > (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> > [*Id.* at 28, 926 A.2d 350 (quoting *Mazza v. Bd. of Trs.*, 143 N.J. 22, 25, 667 A.2d 1052 (1995)).]
>
> Thus, "[w]hen an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." Ibid. (citations omitted). Judicial respect for proper administrative agency action runs deep: "Deference controls even if the court would have reached a different result in the first instance." Ibid. (citing *In re Taylor*, 158 N.J. 644, 657, 731 A.2d 35 (1999)).

Id. 331-332, 944 A.2d 622. Also contrary to Petitioner's assertion, the New Jersey Supreme Court never "rejected" the New York standard of review.

The opposite is true.[2] The Court noted that both New York and New Jersey apply a deferential standard of review.

Notwithstanding the application of a deferential standard of review, the New Jersey Supreme Court concluded:

> The application of this standard of review informs our conclusion that the Panel's determination that "the Port Authority violated the Instruction when it transferred PBA unit work to non-unit employees without negotiating with the PBA" is not entitled to any special deference and should be rejected. This is because the Panel neither followed the law nor relied on any particularized expertise in reaching its conclusion. In specific, the same organic document that created the Panel – the Instruction – also limits its jurisdiction. In clear and explicit terms, the Instruction states that "the mission and management responsibilities of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations." (Emphasis supplied). The lease arrangement in respect of the international terminal delegated to the lessee all of the Port Authority's obligations

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[2] In this regard, the Port Authority Labor Instruction provides:

> In all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation, Panel members and other persons appointed by the Panel shall be guided but not bound by administrative and judicial interpretations of the public sector labor law of the states of New York and New Jersey.

Instruction, Section III, Paragraph D.

> under its lease with the City of New York and, hence, relieved the Port Authority from the day-to-day operational responsibility for that terminal. For that reason, the Port Authority's plan to lease to a private party the whole of the international terminal directly implicated "its organization, staffing, planning, operating and financial policies," a plan that, prior to its implementation, was presented to and approved by the Port Authority's Board and, by the submission and approval of its minutes, by the Governors of both New Jersey and New York. Furthermore, the Panel's decision hinged solely and exclusively on its interpretation of the lease between the Port Authority and JFKIAT, a matter that does not reside within the Panel's unique area of competence. When gauged in the aggregate, then, the Panel's determination must be rejected.

Id. 332-333, 944 A.2d 622-623.

Reversing a determination of an administrative agency where, as here, it ignores the limitations set forth of its enabling authority is not contrary to New York or federal law as Petitioner asserts. To the contrary, it is in conformance with it. Thus, in *Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v Williams*, 72 N.Y.2d 137, 531 N.Y.S.2d 791, 527 N.E.2d 274, the New York Court of Appeals held that the courts should use their own competence to decide issues of law raised by an agency's compliance with the provisions of the State Administrative Procedure Act in promulgating regulations, and should defer to the agency's special expertise only where such expertise is relevant. See also, *Hamburg v McBarnette*, 83 N.Y.2d 726, 613 N.Y.S.2d 355, 635 N.E.2d 1225 (1994), holding that the court would not

defer to the State Department of Health's interpretation of its regulations regarding reimbursement for local public health services where the department essentially repeated the statutory language. Similarly, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706, a court will set aside an agency action if it finds that the action exceeds the authority granted, or violates limitations imposed, by a federal statute. *See* APA § 706(2)(C) "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

Pursuant to and in conformance with these principles, the Supreme Court of New Jersey properly held:

> [P]ursuant to the Instruction governing labor relations at the Port Authority, the redeployment of Port Authority police officers occasioned by the 1997 lease of the international terminal at JFK Airport was exempt from any collective bargaining requirement. We further conclude that, even if the Port Authority was required to collectively bargain the effects of the 1997 lease of the international terminal at JFK Airport, and even if the work on the leased premises may well have constituted "unit work," the Port Authority was not obligated to collectively bargain its transfer in any event.

Id. at 319, 944 A.2d 614.

Application of well-accepted principles of jurisprudence reflected in the laws of New Jersey, New York and the United States support the conclusions of the New Jersey Supreme Court and the petition should be denied.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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No. 08-274

IN THE

Supreme Court of the United States

PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

4. Whether the federal question raised in the Petition was presented to the Supreme Court of New Jersey.

5. Whether the Supreme Court of New Jersey correctly interpreted and applied the Instruction.

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THE PETITION SATISFIES RULE 14.1(g)(i); THE PBA RAISED THE FEDERAL QUESTION BELOW

Contrary to the Port Authority's assertion, the Supreme Court of New Jersey directly addressed the applicable law applied in reviewing Panel decisions: "The standard of review to be applied to decisions by the Panel has, to date, avoided judicial scrutiny in New Jersey." The New Jersey Court then held that the New Jersey Administrative Procedure Act applied. [Appendix A at 18a-20a]. The Supreme Court of New Jersey was incorrect. It should have

applied federal law in reviewing the Panel decision. As noted in the Petition, Petitioners argued before the New Jersey courts that New Jersey law was not the appropriate body of law to apply.

Contrary to the Port Authority's assertion that Petitioners failed to comply with Rule 14.1(g)(i), the Petition (at pages 6 through 13) summarized the briefs submitted by all parties to the Panel, to the Superior Court, to the Appellate Division, and to the Supreme Court. At each stage of the appellate review process, the PBA argued consistently that New Jersey law did not apply and that the New Jersey courts had to apply an amalgam of New York and New Jersey law. The Panel expressly argued that the divergence between New York and New Jersey law had required the Panel to take an independent approach. These citations satisfy Supreme Court Rule 14.1(g)(i).

It is true, as the Port Authority argues and as we conceded [Petition at 16, n. 24], that the PBA never labeled its arguments on applicable law as an argument to specifically apply federal law. But arguments about what law applies were repeatedly made, and the choices of law proposed by PBA and the Panel to the New Jersey courts are, in effect, the amalgam that would be federal law in this context. Both the PBA and the Panel consistently argued that the New Jersey courts could not apply New Jersey law without consideration of New York and federal law.

When the state court does not expressly address the federal question, the petitioner must demonstrate "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams v. Robertson*, 520 U.S. 83,

87 (1997), quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981). In *New York v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court recognized that federal issues could be raised in many ways:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this be done, the claim is to be regarded as having been adequately presented.

The PBA and Panel briefs were sufficient to alert the Supreme Court of New Jersey that the standard of review had, thus far, "avoided judicial scrutiny in New Jersey." The PBA and the Panel argued that federal law should have been applied. The PBA cannot be faulted for the New Jersey Supreme Court's failure to address the issue in its decision. But the PBA and the Panel presented the issue "with fair precision and in due time."

Unfortunately, the Supreme Court of New Jersey chose to apply a less deferential standard than the New York courts would apply and even a less deferential standard than the New Jersey Supreme Court applies to decisions of New Jersey administrative agencies.

APPLYING THE WRONG DEFERRAL STANDARD, THE NEW JERSEY SUPREME COURT MISAPPLIED THE INSTRUCTION

By rejecting the Panel's decision in this case, the Supreme Court of New Jersey cavalierly eviscerated the entire line of Panel decisions beginning with *The Lieutenant's Case*, 77 PAERP 6 (1978). As the Panel

stated, "Through case law over an extended period of time, the Panel has clearly enunciated the standards to be applied in determining whether a decision to transfer unit work is mandatorily negotiable and thus whether an unlawful transfer of unit work has occurred." [Appendix C at 89a]. Subcontracting bargaining unit work necessarily implicates "staffing" matters.

Relying solely upon the provision in the Instruction that "the mission and management authority of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations" [Appendix A at 21a-22a], the Supreme Court of New Jersey ignored the fact that after the Panel adopted the *Fibreboard*-plus test in *The Lieutenant's Case*, the parties had vested the Panel with exclusive jurisdiction to resolve unit work disputes. [Appendix C at 88a-89a and n. 2]. Thus, the Panel was required to consider relevant portions of the collective bargaining agreement [Appendix C at 88a-89a]:

> 1. . . . during the term of the Agreement, there will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other work currently and heretofore performed by Police Officers shall be maintained. . . .
>
> 7. All existing Police Officer positions and/or assignments shall be maintained during the term of this memorandum of Agreement in accordance with the Police Position and/or Assignment List agreed upon between the parties so long as the work being performed continues to be

performed by or **on behalf of** the Port Authority. (Joint Exhibit 11, Article XXX). (emphasis added).

Despite citing these contractual provisions in its recitation of the facts [Appendix A at 7a], the Supreme Court of New Jersey then ignored them and their role in the Panel's analysis of the facts. Instead, in concluding that the Panel decision was not entitled to "any special deference," the Supreme Court of New Jersey explained that the Panel's interpretation of the lease between the Port Authority and JFKIAT "does not reside within the Panel's unique area of competence." [Appendix A at 22a]. Because the parties had expressly authorized the Panel to interpret the collective bargaining agreements' unit work provisions, the Panel's reliance on the contract provisions was entitled to deference.

Emphasizing that the Panel's *Fibreboard*-plus test was not consistent with its application to New Jersey state employees (which should have been irrelevant to the review of a Panel decision), the Supreme Court of New Jersey then purported to apply the test to the facts without either deferring to the Panel or explaining how the Panel's application of the test was arbitrary or capricious. [Appendix A at 24a-28a].

In sum, the Supreme Court of New Jersey simply substituted its interpretation for the Panel's, contrary to this Court's instruction that a reviewing court should uphold an agency's interpretation when it is "rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board." *Curtin-Matheson Scientific v. NLRB*, 494 U.S. 775, 787 (1990).

CONCLUSION

The petition for the writ of certiorari should be granted and the decision of the Supreme Court of New Jersey should be reversed.

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